DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Docket No. AO–370–A5; FV93–930–2]

Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin; Secretary's Decision and Referendum Order on the Proposed Marketing Agreement and Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and referendum order.

SUMMARY: This decision proposes the issuance of a marketing agreement and order for tart cherries grown in certain designated States and provides growers and processors the opportunity to vote in a referendum to determine if they favor the proposed order. For the purposes of this document, the term ''Cherries'' refers to all tart/sour cherry varieties grown in the proposed production area, which consists of the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. The proposed order would authorize volume regulation, grade, size, and maturity regulations, and mandatory inspection. It 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, and would be financed by assessments on handlers of tart cherries grown in the production area. A primary objective of this program would be to improve producer 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: The referendum shall be conducted from June 12, 1996, through July 10, 1996. The representative period for the purpose of the referendum herein ordered is July 1, 1995, through May 31, 1996.

FOR FURTHER INFORMATION CONTACT:

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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]; Recommended Decision and Opportunity to File Written Exceptions to the Proposed Marketing Agreement and Order, issued November 20, 1995, and published in the Federal Register on November 29, 1995 (60 FR 61292). The reopening of the comment period to file written exceptions to the proposed marketing agreement and order was issued on December 27, 1995, and published in the Federal Register on January 2, 1996 (61 FR 21).

This administrative 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 to review the Secretary's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

Preliminary Statement

This proposed marketing agreement and order was formulated on the record of a public hearing held December 15–17, 1993, in Grand Rapids, Michigan; January 13, 1994, in Provo, Utah; February 15–17, 1994, in Portland, Oregon; January 12–13, 1995, in Portland, Oregon; and January 18–19, 1995, in Grand Rapids, Michigan. These multiple hearing sessions were held to consider a proposed marketing agreement and order regulating the handling of tart cherries grown in the proposed production area. The hearing was held 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). Approximately 40 witnesses, including tart cherry growers, handlers, and economists, testified in support of the order. Growers and handlers mainly from the States of Oregon and Washington testified in opposition to the proposed order and asked to have Oregon and Washington excluded from 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, USDA determined that the hearing should be reopened to clarify some provisions. USDA wanted to obtain additional information and clarification concerning: (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 12–13, 1995, in Portland, Oregon, and January 18–19, 1995 in Grand Rapids, Michigan. At the conclusion of the Michigan hearing, the deadline for filing post-hearing briefs was set at March 17, 1995. Ten briefs were filed following the first briefing period and seven briefs were filed following the second briefing period.

The proponents testified that severely fluctuating tart cherry prices are

inherently harmful to growers and consumers. It was contended that the proposed marketing order would improve grower returns by strengthening consumer demand through volume control and quality assurance mechanisms.

Upon the basis of evidence introduced at the hearing and the record thereof, the Administrator of the Agricultural Marketing Service (AMS) on November 29, 1995, filed with the Hearing Clerk, U. S. Department of Agriculture, a recommended decision with the opportunity for written exceptions by December 29, 1995. Subsequently, the USDA received three requests to provide more time to analyze the recommended decision and prepare and file written comments. Based on these requests the USDA reopened the comment period until January 16, 1996.

There were 29 exceptions received on the proposed order. Seven exceptions support the order as proposed, 4 support the order with minor modifications, 2 support the order with substantial modifications, 15 oppose the order, and 1 recommends only a minor technical clarification. Exceptions were received from: Richard DeRuiter, Michigan tart cherry processor; Senator Mark Hatfield, Congressional Representatives Peter DeFazio, Jim Bunn, Ron Wyden, Elizabeth Furse, and Wes Cooley, all from the State of Oregon; Mark L. Schrepel, Oregon tart cherry grower and processor; William R. Sherman, Burnette Foods, Inc., Michigan grower/processor; Randy Hageman, General Manager, Milne Fruit Products; Rick Jacobson, NORPAC Foods; Christian Schlect, President, Northwest Horticultural Council; Mark Riley, Michigan tart cherry grower; Terry Dorsing, President, Washington Tart Cherry Products, Inc.; Ray, Jim, Mildred and Mary Schultz, Michigan tart cherry growers; Philip Walker, Oregon tart cherry grower; Thomas A. Facer, Vice-President Agricultural Services, Comstock Michigan Fruit Division; Lee W. Schrepel, Chair, Oregon Tart Cherry Association; Bruce Andrews, Director, Oregon Department of Agriculture; the Department of Justice, Anti-Trust Division; Claude A. Rowley, Manager, Payson Fruit Growers; David Frank, Fruit Belt Canning, Co. Inc.; Norman R. Veliquette, President, Great Lakes Packing Company; Dean Kleckner, President, American Farm Bureau Federation; Forest P. Johnson, Michigan tart cherry grower; Ken Guise, Executive Vice-President, Chief Operating Officer, Knouse Foods Cooperative, Inc.; Kenneth T. Morrison, President, Cherry Growers, Inc.; David White, President, Chain O'Lakes Fruit Growers Association; Randy G. Harmson, General Manager, Michigan Agricultural Cooperative Marketing Association, Inc.; Jack Laurie, President, Michigan Farm Bureau; Teryl R. Roper, Associate Professor and Extension Fruit Specialist, University of Wisconsin; Gene A. Veliquette, Michigan tart cherry grower, President, Shoreline Fruit, Inc.; Ian A. MacKay, CPA, American Institute of Certified Public Accountants; and the Cherry Marketing Institute (CMI), the proponent group.

The issues raised in the exceptions are discussed in the *Findings and Conclusions.*

Small Business Consideration and Paperwork Reduction Act: In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), AMS 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 less than $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 45,000 acres in 1986, to more than 50,000 acres in 1990.

Record evidence also 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, 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 addressed in this proposed 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 USDA 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 since 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 record keeping 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 would 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 effected 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 20 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 read and sign the marketing agreement.

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 record keeping requirements contained in the proposed rule specific to the ballot material to be used in conducting the referendum have been approved by OMB on a temporary basis and have been assigned OMB number 0581–0177. An expiration date of September 1996 has been established for this temporary OMB approval. A complete package of information and collection requirements contained in this proposed rule will be submitted, for approval, to OMB at a later date. Those requirements would not become effective prior to OMB review. Interested persons would be provided 60 days to comment on : (1) whether the proposed collection of information is necessary for the functioning of the proposed tart cherry marketing order program and USDA'S oversight of that program; (2) the accuracy of the collection burden estimate and the validity of methodology and assumptions used in estimating the burden on respondents; (3) ways to enhance the quality, utility, and clarity of the information requested; and (4) ways to minimize the burden, including use of automated or electronic technologies. Any record keeping 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 record keeping 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. After reviewing the record AMS determined that direct or indirect costs imposed under the marketing order regulation would not be proportionately greater on small handlers than on large handlers, or conversely, that any projected order benefits would not be proportionately smaller for small handlers than for large handlers.

The record evidence indicates that the proposed order may impose some additional costs and requirements on handlers, but those costs are insignificant and are directly proportional to the size of the regulated handlers. The evidence also indicates 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 benefit of producers. The evidence also indicates that handlers 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. Small handlers and 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, AMS has determined that the issuance of this proposed rule and referendum order would not have a significant economic impact on a substantial number on small entities.

The material issues presented on the record are:

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 will 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 marketing 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 definition of terms used therein which are necessary and incidental to attain the declared policy and objectives of the order and the Act;

(b) The establishment, composition, maintenance, procedures, powers and duties of a committee that shall be the local administrative agency for assisting the Secretary in the administration of the marketing 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 marketing development projects, including paid advertising;

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

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

(g) The establishment of requirements for handler reporting and record keeping;

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

(i) Additional terms and conditions as set forth in section 930.81 through section 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 section 930.92 through section 930.94 that are common to marketing agreements only.

Findings and Conclusions and Rulings on Exceptions

The material issues, findings and conclusions, rulings, and general findings and determinations included in the Recommended Decision set forth in the November 29, 1995, issue of the Federal Register [60 FR 61292] are hereby approved and adopted subject to the following additions and modifications:

Based upon the exceptions filed by Department of Justice, Anti-trust Division (DOJ), and Mr. Lee Schrepel, the findings and conclusions in material issue number 2 of the Recommended Decision concerning the question of whether 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 are amended by adding the following eight paragraphs after the last paragraph (60 FR 61297) to read as follows:

In its exception to the Recommended Decision, DOJ urged USDA to reject the proponents' request for a marketing order for tart cherries. DOJ contended that the proposed marketing order is not by any means a ''national solution'' for any existing problems in the tart cherry industry, and its implementation would harm the public. DOJ asserts there is no reliable evidence to show that the proposed marketing order would produce supply or price stability and it should not be issued. In addition, DOJ cited two areas of disagreement with the Recommended Decision. DOJ stated that: (1) The tart cherry industry does not require regulation based on the evidence presented at the hearing; and (2) the proposed marketing order would not stabilize tart cherry prices or supplies.

In regard to its first concern, DOJ stated that growers and handlers who prefer to protect against fluctuating prices may do so by using any one of the numerous market mechanisms that already exist for that purpose. DOJ stated that these mechanisms are far superior to government regulation for reducing risk because they help producers deal with fluctuating supplies without artificially inflating prices. As previously stated, the market mechanisms suggested by DOJ are currently available to the industry. The marketing order is another tool for the industry to use in stabilizing supplies. Marketing orders do not exist to the exclusion of other market mechanisms. However, as the record shows, those mechanisms have not been effective in dealing with the production variability problems faced by the industry.

In regard to its second concern, DOJ contended that the finding that the proposed marketing order would contribute to orderly marketing conditions and, therefore, effectuate the declared policy of the Act, is without support in the record. The agency stated that USDA relied heavily on the testimony of Dr. Forker, who testified on price stability. It is DOJ's position that Dr. Forker's conclusions on price stability are wrong and that he improperly manipulated the data to reach a desired result. In addition, in his exception, Mr. Lee Schrepel also objected to USDA relying on the evidence presented by Dr. Forker.

As previously stated, USDA believes that the proponents have demonstrated a need for a tart cherry marketing order. The record supports the argument that the industry has suffered since the termination of the prior order. A proposed order was developed to correct the situation with the goal of increasing grower returns and bringing supplies in line with demand. Authority for volume control regulation which would only be used when the market warrants it, is included in the order. Record evidence supports the need for the marketing order. Evidence presented at the hearing did not offer a basis for discrediting Dr. Forker. Dr. Forker is a recognized expert in his field and there was no persuasive evidence presented at the hearing which would refute his testimony. In addition, USDA did not rely solely on Dr. Forker. It considered all the testimony and analyzed the record in its entirety in arriving at its findings and conclusions.

In Mr. Schrepel's exception, he stated that USDA has discounted any and all arguments that reporting and record keeping requirements will be significantly greater for Oregon producers and processors, and that their subsequent costs and benefits of operating under the marketing order are proportionately and significantly different than expected to be experienced in larger producing districts. Mr. Schrepel also contends that smaller producing States (i.e., Pennsylvania and Oregon) have not been producing the reports that will be needed under the marketing order, and therefore it will be an added burden on small handlers to submit such reports to the Board under the marketing order.

Handlers from the smaller producing areas testified that reporting to the Board would not be unduly burdensome. They normally keep such records in conducting their business operations and therefore could easily compile the information for use under the marketing order. In addition, handlers in districts which are not volume regulated (e.g., the smaller producing states) would have fewer reporting and record keeping requirements than those handlers in regulated districts since they would not be maintaining reserve pools and reporting on storage and disposition. Such requirements would stay reduced as long as that district's production remains below the trigger amount for volume regulation.

The record evidence also supports the premise that small growers and handlers would have the most to benefit from implementation of the marketing order because such growers and handlers have been going out of business over most of the last 8 years due to low cherry prices. Since the order would help increase grower returns, this should increase the buffer between success and failure.

Based on the above discussion, the exceptions by DOJ and Mr. Schrepel are denied.

Based upon the exceptions filed by Mr. Dorsing, Mr. Hageman, Mr. Mark Schrepel, and Mr. Lee Schrepel, the findings and conclusions in material issue number 3 of the Recommended Decision concerning the definition of the production area and the commodity to be covered are amended by adding the following six paragraphs after the last paragraph (60 FR 61299) to read as follows:

The exception filed by Mr. Dorsing stated that the States of Washington and Oregon should not be included in the proposed marketing order. Mr. Dorsing

indicated that 1995 production figures for the State of Washington show that over 90 percent of the tart cherry production went to juice concentrate. He contended that the majority of producers in Washington and Oregon produce their cherries for use in juice concentrate rather than canned or frozen products. Mr. Dorsing also stated that the juice characteristics of the Northwest tart cherry are unique in character and juice companies are finding that the characteristics of Northwest juice concentrate meet their required specifications. He also stated that Northwest production is not adding to the ''glut'' in the packed product industry, since the Northwest is primarily a juice concentrate industry. Mr. Dorsing stated further that the Northwest tart cherry industry pays for its own storage, develops its own markets and does its own promotion and advertising. Thus, there is nothing to be gained by the Northwest being included in the tart cherry marketing order. In addition, Mr. Dorsing requested that each State be allowed to vote separately for inclusion in the marketing order.

The exception filed by Mr. Hageman opposed the proposed marketing order. He stated that the order would unnaturally inflate grower prices to nearly double the current level. He also asked that Washington and Oregon be excluded from coverage under the proposed marketing order. The reason given was that Washington and Oregon account for 6.5 percent of the 1990–1994 total U.S. production and that, during the same time period, less than 20 percent of the Washington and Oregon production entered the five plus one canned and frozen product line. This would indicate that less than 1.5 percent of the nation's supply of five plus one stock was produced in the Northwest. It was argued by Mr. Hageman that the Northwest industry is dependent on the juice concentrate and puree market which does not compete with the five plus one market. Mr. Hageman also requested a State-by-State referendum.

The exception filed by Mr. Mark Schrepel stated that any proposed order should not include the State of Oregon, and that the Act appears not to include cherries for canning or freezing if they originated in Oregon or Washington. Mr. Schrepel believes that no Oregon grower or processor supports the order. He also requested a State-by-State referendum.

The exception filed by Mr. Lee Schrepel indicated that one of the reasons the proposed order should exclude Washington and Oregon is because the Northwest has distinctive production and marketing characteristics. Further, it is Mr. Schrepel's contention that successful marketing orders depend on the support of affected producers and handlers. According to him, the unanimous opposition of Oregon producers and handlers and near unanimous opposition by Washington producers and handlers demonstrate the lack of this essential element. Mr. Schrepel also requested voting by a State-by-State referendum.

As previously stated, to exclude any portion of the proposed production area would tend to defeat the purpose of the proposed order and could depress prices of the regulated cherries. Contrary to Mr. Schrepel's suggestion, Oregon and Washington cherries for freezing or canning are not excluded from coverage under the Act. Record evidence supports the position that the oversupply situation in the U.S. is a national problem. In addition, the juice concentrate market in areas such as Oregon and Washington can be impacted by production in other areas. Therefore, the entire industry needs to work together to alleviate the problem. Also, the record evidence supports the argument that the Northwest has the greatest potential to expand tart cherry producing acreage, thereby further benefiting from the proposed order in the event of increased production. Therefore, the Northwest should be included in the production area under the proposed order and the requests to exclude Oregon and Washington from the proposed production area are denied.

In regard to the requests to conduct a State-by-State referendum to determine who should be covered under the proposed tart cherry order, such requests are denied. The Act requires that all producers and processors in the proposed production area should vote in a referendum on the promulgation of an order. There is no authority for State by State voting.

Based upon the exception filed by CMI, the findings and conclusions in material issue number 5(a) of the Recommended Decision concerning the commodity to be covered are amended by adding the following paragraph after the sixth paragraph (60 FR 61300) to read as follows:

CMI stated that the definition of cherries should be modified to correct the misspelling of a species name and to include the words ''or hybrids of'' to the cherry definition. Adding these words would correct and clarify the definition. Therefore, CMI's exception is adopted herein.

Based upon the exceptions filed by CMI, Mr. Morrison, and Mr. Facer, the findings and conclusions in material issue number 5(b) of the Recommended Decision concerning the establishment, composition, maintenance, procedures, powers and duties of the Board are amended by adding the following eight paragraphs after the 73rd paragraph in material issue number 5(b) (60 FR 61307) to read as follows:

In its exception, it was CMI's contention that the order should be modified to require that, in order for the Board to adopt preliminary or final free and restricted percentages for any crop year, at least 11 Board members from districts that would be subject to volume regulation vote in the affirmative on any such action. CMI also wanted this requirement to apply if there are modifications to the marketing policy under section 930.50(f). In addition, CMI argued that since the Recommended Decision contains a Board voting requirement of two-thirds of the entire Board rather than a majority of the Board, as originally proposed, this modification is necessary because it is important that a clear majority of those who are going to be regulated agree with the determination before volume regulation can go into effect. It was also CMI's concern that the unregulated districts could somehow influence the decision to impose volume regulation when such regulation is a possibility under the optimum supply formula. Eleven votes out of 13 is approximately 85 percent of the votes from the volume regulated districts. CMI suggested that this voting requirement apply to recommendations made under sections 930.50(b), 930.50(d) and 930.50(f).

In his exception, Mr. Morrison argued that Board members from nonregulated districts should not be allowed to vote on matters concerning regulation of the crop or the timing on the release of the primary pool.

Throughout this formal rulemaking process, it has been expressed that the oversupply situation in the U.S. is a national problem, and that the entire industry should work together to alleviate the problem by participating in the proposed marketing order. Although USDA understands CMI's concerns, they are overstated, since the proposed order provisions concerning the marketing policy and issuance of volume regulations contain a number of procedural steps which, in many respects, make them self-executing. Also, it is the Secretary, and not the Board, who issues the volume regulations and sets the final free and restricted percentages. Therefore, as

previously discussed in the Recommended Decision, all actions by the Board, including volume regulation issues, should continue to require a two-thirds affirmative vote of the entire Board to pass. Therefore, CMI's and Mr. Morrison's exceptions are denied.

Mr. Facer requested that only regulated districts be allowed to vote on the release of the primary reserve. This is not necessary nor is it supported by the record. As previously stated the situation that exists in the industry is a national problem, therefore, all members that represent the tart cherry industry in the Board should vote in all matters. The reserve would be released by the Board when certain conditions exist. For example, proposed section 930.50(g) would release, to all handlers, 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. Therefore, Mr. Facer's exception is denied.

Based upon the exception filed by CMI and Mr. Lee Schrepel, the findings and conclusions in material issue number 5(b) of the Recommended Decision concerning the establishment, composition, maintenance, procedures, powers and duties of the Board are amended by adding the following three paragraphs after the fourth paragraph (60 FR 61301) to read as follows:

Questions and recommendations regarding order language concerning the Board membership limitation on sales constituencies in proposed § 930.20(f) were raised by both Mr. Lee Schrepel and CMI. It was Mr. Schrepel's concern that a single sales constituency could potentially gain control of the Board and he asked that not more than 30 percent of the Board be allowed to be affiliated (even remotely) in any manner with a single sales constituency. However, a 30 percent limitation is not adequately supported by the record. CMI's concern was that if a grower who sells cherries through a number of different processors is nominated for membership to the Board in a district, all of those processors but one would then be prevented from having grower representation on the Board. According to CMI, this would be true even if the grower sold a very small amount of cherries to a particular handler on a one-time basis. As proposed by CMI, this concern can be addressed by considering the sales constituency to which the grower delivers the majority of his or her cherries to be the grower's sales constituency for nomination and representation purposes.

Concerns regarding sales constituencies and Board representation have been raised from the beginning of this rulemaking process. That is one of the reasons that USDA decided to impose a two-thirds voting requirement instead of a simple majority, and added a provision requiring the consensus of at least two-thirds of the entire Board to pass any action by the Board (see page 61306 of the Recommended Decision). The record is clear that the major reason § 930.20(f) generated so much discussion was the perception among some of the participants at the hearing sessions that the Board could become controlled by a single constituency, and the interests of those growers and handlers not associated with such constituency would not receive proper attention or could be ignored altogether. Additions and changes to § 930.20(f) were suggested by Mr. Lee Schrepel and CMI, and although these have merit, they are not dispositive of the main issue, *i.e.*, control of the Board by a single interest group.

When the question of adding further restrictions to § 930.20(f) arose early in the rulemaking proceeding, CMI indicated that it was unlikely that any single sales constituency could gain control of the Board, and that theoretical projections of such possibilities are not realistic. Furthermore, it was pointed out by CMI that the Secretary could effectively enforce the limitations contemplated by § 930.20(f) without modifying its language because the ultimate decision of whom to appoint to the Board lies with the Secretary. Therefore, in light of such requirements, and clear record evidence that the purpose of § 930.20(f) is to achieve a fair and balanced Board representation, USDA will not add additional limitations to § 930.20(f), but, instead, will add language to more clearly express the purpose of that section. In addition, the Secretary could issue regulations to implement the section, if necessary.

Based upon the exception filed by Mr. Lee Schrepel, the findings and conclusions in material issue number 5(b) of the Recommended Decision concerning the establishment, composition, maintenance, procedures, powers and duties of the Board are amended by adding the following two paragraphs after the 30th paragraph (60 FR 61303) to read as follows:

In Mr. Lee Schrepel's exception, he stated that the testimony by the proponent made it clear that its intent is to maintain control of the Board's public member. It was Mr. Schrepel's view that the proposed marketing order still has no provisions to prevent the Board from appointing Board members. Mr. Schrepel argued that the public member should be appointed at the sole discretion of the Secretary, without the advice or consent of the Board.

The Secretary has discretion in appointing members and alternate members to the Board, including the public member. The appointments can be made from Board nominees or other qualified individuals. In the case of the public member and such member's alternate, the Secretary is relying on the Board to nominate and elect eligible individuals. As was previously stated in the Recommended Decision, such individuals would then be subject to appointment by the Secretary. This procedure is similar to the selection of public members and alternates on other marketing order committees. Therefore, § 930.24 is modified to clarify the selection and appointment procedure.

Based upon the exceptions filed by Mr. Facer, Mr. Guise, Mr. Lee Schrepel and CMI, the findings and conclusions in material issue number 5(b) of the Recommended Decision concerning the establishment, composition, maintenance, procedures, powers and duties of the Board are amended by adding the following six paragraphs after the 27th paragraph (60 FR 61303) to read as follows:

The exception filed by Mr. Facer stated that the responsibilities and authority of the Board relating to its ability to assess the industry for research, development, promotion and advertising are too broadly described. Also, the Board composition includes too much representation from the nonregulated districts.

USDA relies on the marketing order committees and boards to recommend rules and regulations concerning their particular industries. Marketing order committees and boards are comprised of industry grower and handler members and are experienced in the industry's operations and should be capable of evaluating the industry's needs. It is for the Secretary to determine whether rules recommended by committees or boards should be issued. Board composition was recommended by the proponent group to provide fair and equitable representation to the entire industry based on the relative levels of production of cherries in the various producing districts. It was the proponents' position that all States covered under the order should be represented on the Board in order to keep them informed of the Board's activities. In addition, all States covered under the marketing order have the potential to become regulated States in the future. Mr. Facer's exception is therefore denied.

The exceptions filed by Mr. Ken Guise, Mr. Lee Schrepel and CMI requested that the proposed order be modified to correct the handler nomination petition process for District 6. Currently, only one handler exists in District 6, which covers the State of Pennsylvania (Knouse Foods Cooperative, Inc.). The Recommended Decision provided that for a handler to be nominated for election to the Board, the handler would have to obtain the signature of at least one handler, other than the nominee, from the nominee's district who is eligible to vote in the referendum. Under this procedure, Mr. Guise and CMI point out that since there is no other handler in District 6 except Knouse Foods, such handler would be denied the opportunity to be nominated for election to the Board and District 6 would never be represented by a handler representative unless another handler were to start operating in that District.

CMI stated that this result is wholly unintended by the proponent and requests that the USDA modify section 930.23(b)(2) to require that when nominating handler members to the Board, the petition form be signed by a handler other than the nominee shall not apply in any District where less than two handlers are eligible to vote.

Mr. Schrepel requested that the same procedures developed for Pennsylvania also apply to Washington and Oregon, since they have very few handlers. The modification proposed by the proponents would also address Mr. Lee Schrepel's concerns since the modification would apply to any District that has less than two handlers.

Mr. Guise's, Mr. Lee Schrepel's and CMI's exception on this issue is therefore adopted in this Secretary's Decision and appropriate changes are made in section 930.23(b)(2).

Based upon the exception filed by Mr. Lee Schrepel, the findings and conclusions in material issue number 5(b) of the Recommended Decision concerning the establishment, composition, maintenance, procedures, powers and duties of the Board are amended by adding the following paragraph after the 33rd paragraph (60 FR 61304) to read as follows:

Mr. Lee Schrepel requested that the procedures for electing alternate members to the Board be more clearly detailed in the order. The proposed order provides under section 930.23 that each member and alternate member would be nominated and elected separately. The Board has the authority to recommend rules and regulations to effectuate such authority and specify more detailed procedures in regard to the nomination process. Therefore, Mr. Schrepel's exception is denied.

Based upon the exception filed by Mr. Lee Schrepel, the findings and conclusions in material issue number 5(b) of the Recommended Decision concerning the establishment, composition, maintenance, procedures, powers and duties of the Board are amended by adding the following paragraph after the 35th paragraph (60 FR 61304) to read as follows:

In his exception, Mr. Schrepel stated that USDA has submitted contradictatory language regarding the nomination process. He claimed that USDA appears to be advancing it's own interests of fast tracking the proposal, if promulgated, by conducting nomination meetings in the districts and allowing growers and handlers to vote for members and alternate members at these meetings. USDA is not fast tracking such a proposal. If the Secretary determines that conducting nomination meetings and voting at these meetings would be the best method of completing the process in a timely manner, then such method should be used. Should the proposed order receive the required level of grower and processor support in the referendum, USDA intends to conduct meetings to nominate and elect the initial Board members and alternate members using petition forms and election ballots as provided by § 930.23. Therefore, Mr. Schrepel's exception is denied.

In Mr. Lee Schrepel's exception, he indicated that there was an error in proposed section 930.22 regarding Board members' terms of office. The current proposed order specifies that 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 and one-third of such members and alternate members shall serve two fiscal years. The latter reference to two fiscal years should be changed to three fiscal years to be consistent with the record evidence. Mr. Schrepel is correct and his exception is adopted herein by revising the order language.

Based upon the exceptions filed by Mr. MacKay and Mr. Lee Schrepel, the findings and conclusions in material issue number 5(b) of the Recommended Decision concerning the establishment, composition, maintenance, procedures, powers and duties of the Board are amended by adding the following three paragraphs after the 51st paragraph (60 FR 61305) to read as follows:

In Mr. Lee Schrepel's exception, he stated that in section 930.31(h), the reference to disbursement of all funds, including the payment of storage to handlers, should not be included in that particular section. USDA does not intend for the Board to utilize assessments to pay for the storage of any cherries or cherry products. The proponent's proposal to collect assessments from handlers for storage of primary inventory reserve cherries was removed by the USDA in the Recommended Decision. Therefore, such language referencing storage assessments should not be contained in the proposed order. This has been an oversight and such language shall be removed. Therefore, Mr. Schrepel's exception is adopted.

The exception filed by Mr. MacKay requested that the proposed marketing order be modified under the area of duties of the Board to include that the Board's financial statements be prepared in accordance with generally accepted accounting principles and to be audited by a certified public accountant. Currently, the proposed order provides that the Board cause its books to be audited by a certified public accountant. Mr. MacKay requested USDA to clarify in the final order whether the term ''books'' refers to the Board's financial statements and clarify the basis for the financial statement presentation (generally accepted accounting principles).

The term ''books'' does refer to the Board's financial statements. The modification to change the term ''books'' to ''financial statements'' is incorporated in this document. However, the modification to clarify the basis for the financial statement presentation (generally accepted accounting principles) is denied. The Fruit and Vegetable Division's Marketing Agreement and Order Operation Manual specifies the types of financial statement presentations to be used in committee audits. This manual is used by all marketing order committees and is a policy document issued by USDA. It is not feasible to place such language in the order, since in the future, USDA could change the basis for financial statement presentation for all marketing order committees to use. If such a change occurred, the marketing order would have to be amended, which can be a costly process. Therefore, such a modification is denied. Thus, Mr. MacKay's exception is partially denied.

Based upon the exception filed by Mr. Lee Schrepel, the findings and conclusions in material issue number 5(c) of the Recommended Decision concerning the authority to incur expenses and the procedure to levy assessments on handlers to obtain revenue for paying such expenses are

amended by adding the following paragraph after the seventh paragraph (60 FR 61308) to read as follows:

In his exception, Mr. Lee Schrepel contended that a built-in limit on the authority to level assessments should be established. Mr. Schrepel proposed that this authority be capped at no more than 5 percent of the average field price for the season. He suggested that this limit could be adjustable through modification at continuance referendum time or more frequently. Under the order, the tart cherry industry assessment rate would be dependent on meeting administrative and other expenses and would be necessarily influenced by the volume of the crop. The assessment rate would be established through informal rulemaking which would require a Board recommendation and an opportunity for public comment. Mr. Schrepel did not specify why 5 percent of the average field price for the season would be a reasonable limit, and record evidence does not contain support for such a cap. However, if the marketing order is implemented, the Board could adopt such a cap as a guideline when recommending the assessment rate. Therefore, Mr. Schrepel's exception is denied.

Based upon the exception filed by Mr. Lee Schrepel, the findings and conclusions in material issue number 5(c) of the Recommended Decision concerning the authority to incur expenses and the procedure to levy assessments on handlers to obtain revenue for paying such expenses are amended by adding the following two paragraphs after the eighth paragraph (60 FR 61308) to read as follows:

In Mr. Lee Schrepel's exception, he stated that it is not equitable to exempt from assessment those cherries which are diverted in accordance with proposed sections 930.58 and 930.59.

Pursuant to section 930.62, cherries would be exempt from assessments if they are diverted according to section 930.59. Product diverted by handlers would not be entering normal market channels, therefore assessments should not be levied. Mr. Schrepel does not point to any evidence in the record to support his exception concerning assessment of diverted cherries. Conversely, record testimony amply supported exempting diverted cherries, since they are not entering normal market channels. Therefore, Mr. Schrepel's exception is denied.

Based upon the exceptions filed by Mr. Mark Schrepel and Mr. Morrison, the findings and conclusions in material issue number 5(c) of the Recommended Decision concerning the authority to incur expenses and the procedure to levy assessments on handlers to obtain revenue for paying such expenses are amended by adding the following three paragraphs after the eighth paragraph (60 FR 61308) to read as follows:

In Mr. Mark Schrepel's exception, he stated that he is concerned about provisions within the proposal that would add expense and hardship to growers. Mr. Schrepel contended that handlers should not be assessed under this marketing order program if handlers are not in a regulated district. He further stated that handlers in unregulated districts should not be assessed for any expenses accrued by the Board since handlers who divert are not assessed on diverted product.

As supported by record evidence, all growers and handlers in the States proposed to be covered under the marketing order, including those not subject to volume regulation, would enjoy the benefits provided by the marketing order (i.e., improved grower returns and increased consumption of tart cherries). Therefore, all handlers should be assessed for the administrative costs of the order. Also, handlers who enter cherries into normal market channels who choose to divert some of their cherries would still be assessed for the cherries that enter normal market channels. Therefore, Mr. Schrepel's exception is denied.

In Mr. Morrison's exception, he stated that further effort needs to be made to make sure that growers understand that the cost of holding and processing the reserve can be passed on to growers by their handlers. It is true that some handlers may pass such costs on to their growers, either directly or indirectly. Under the former order, which was based on a grower pool, growers were directly assessed storage and processing costs for reserve pool cherries. However, this proposed order is based on a handler pool. Therefore, it does not contain authority to assess growers for such costs. Because of this difference, Mr. Morrison's recommendation to somehow emphasize that storing and processing costs can be passed on to growers is denied.

Based upon the exception filed by Mr. Lee Schrepel, the findings and conclusions in material issue number 5(d) of the Recommended Decision concerning the authority to provide for the establishment of production, processing and marketing research and market development projects, including paid advertising, are amended by adding the following paragraph after the sixth paragraph (60 FR 61309) to read as follows:

Mr. Lee Schrepel questioned whether the handlers in States that have State marketing order programs should be exempted from paying assessments on research and marketing development to the Federal marketing order. Mr. Schrepel stated that there should only be one assessment, a Federal or state assessment, not both. There is no current proposal to exempt handlers from paying these assessments if they are in a State that has a State marketing order program. The record evidence did indicate 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 growers are financing such activities through other organizations. The record evidence does not contain support for Mr. Schrepel's proposal, therefore, his exception is denied.

Based upon the exceptions filed by Mr. Frank, Mr. Morrison, Mr. Facer, and Mr. Lee Schrepel, the findings and conclusions in material issue number 5(e) of the Recommended Decision concerning the authority to establish regulations that would require minimum quality and inspection requirements are amended by adding the following six paragraphs after the seventh paragraph (60 FR 61310) to read as follows:

In Mr. Frank's exception, he stated that sections 930.44 (a) and (b) are ambiguous and do not spell out what form of inspection would be required (raw product or finished product). He also stated that any inspection of free tonnage cherries should be a decision by a handler and growers that deliver cherries to such handler. This should not be a decision by an administrative body such as the Board. Local weather conditions could affect a small geographic area, thereby causing damage in a localized area rather than the entire production area under the proposed order. This also interferes with a handler's decision on what quality such handler feels could be marketed. Mr. Frank suggested that the above mentioned sections be deleted from the proposed marketing order.

Mr. Morrison also filed an exception that stated that only the quality of cherries placed in the reserve should be regulated. This would be the same as the prior order. Also, Mr. Morrison stated that the Board should not regulate the raw product grade.

In Mr. Facer's exception, he stated that although the order requires inspection of primary reserve tart cherries, there is no official quality standards for some products. Therefore,

such inspection will be impractical, irrelevant and of no economic benefit.

In Mr. Lee Schrepel's exception, he stated that the Board should not be empowered to require the inspection of all cherries entering the stream of commerce.

As previously stated, the proponents testified that as technology increases, the Board should have the authority to adopt quality standards for cherries, especially those concerning pit count. If quality standards are recommended by the Board and implemented by the Secretary, no handler would 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. Before recommending quality regulation, the record evidence shows that it was the intent of the proponents that the Board would obtain an industry consensus before making a recommendation to USDA on this issue. Any such regulation would be issued by the Secretary through informal rulemaking which would allow an opportunity for comment.

Without additional Board action, only inventory reserve cherries would be inspected, prior to placing them in the reserve. It is imperative to maintain the quality of the reserve so that only good quality cherries are released to handlers to be sold in the marketplace. Therefore, based on the above discussion on the record evidence, Mr. Frank's, Mr. Morrison's, Mr. Facer's, and Mr. Lee Schrepel's exceptions are denied.

Based upon the exception filed by Mr. Lee Schrepel, the findings and conclusions in material issue number 5(e) of the Recommended Decision concerning the authority to establish regulations that would require minimum quality and inspection requirements are amended by adding the following two paragraphs after the 4th paragraph (60 FR 61310) to read as follows:

In Mr. Schrepel's exception, he stated that the cost of inspecting new cherries to be rotated into the reserve and removing older cherries out of the reserve should be at the expense of the handler. Such action as this, undertaken by or at the convenience of the affected handler for the benefit of the handler or some other party, should not be the expense of the industry.

As previously stated, rotating cherries in the reserve is not a requirement. However, it would benefit the industry if it were done. This would insure that good quality cherries are being released when inventory reserve cherries are sold. The Board will have the authority to limit the number of inspections of cherries to be rotated into inventory for which the Board would be financially liable. In order to establish such limits, the Board would make a recommendation to the Secretary and informal rulemaking would be conducted. Based on the fact that the record evidence supports including this authority it will remain in the order. Therefore, Mr. Lee Schrepel's exception is denied.

Based upon the exception filed by Mr. Lee Schrepel, the findings and conclusions in material issue number 5(e) of the Recommended Decision concerning the authority to establish regulations that would require minimum quality and inspection requirements are amended by adding the following two paragraphs after the third paragraph (60 FR 61310) to read as follows:

The exception filed by Mr. Lee Schrepel stated that there should be no reimbursement of inspection costs for quality inspections for any reserve or free market cherries. Also, requirements for reinspection are inappropriate unless such cherries are part of the primary reserve.

The record evidence indicates that quality control inspections would be paid for by handlers. However, inspections of primary reserve cherries should be paid for by the Board. As previously stated, this would insure that only good quality cherries would be available for release from the reserve into the marketplace. This benefits all in the industry. In regard to reinspection, cherries would only be reinspected if they were regraded, resorted, repackaged or any other way further prepared for market. This would be done if a handler had to repackage a product that was already packaged for a client. This provision is a safety valve to prevent poor quality product entering the marketplace. New crop cherries would be inspected prior to being placed in the primary reserve. The record evidence supports the above provisions, therefore, Mr. Lee Schrepel's exception is denied.

Based upon the exceptions filed by CMI, the findings and conclusions in material issue number 5(e) of the Recommended Decision concerning the authority to establish regulations that would require minimum quality and inspection requirements are amended by adding the following paragraph after the seventh paragraph (60 FR 61310) to read as follows:

CMI's exception stated that the proponent wishes to make it clear that the Board would exercise its powers with regard to the establishment of quality standards and inspection requirements in a manner consistent with the establishment of quality standards under the prior order. Producers and handlers were comfortable with the way that the Board under the prior order instituted inspection requirements. The proponents expect the new Board would operate in the same manner, although they recognize that there are obvious significant differences between the two orders. In addition, such quality regulations would be implemented through the informal rulemaking process which would require a Board vote and opportunity for the public to comment.

Based upon the exception filed by Mr. Harmson, the findings and conclusions in material issue number 5(f) of the Recommended Decision concerning the authority to establish volume regulation provisions under the proposed order are amended by adding the following two paragraphs after the 15th paragraph (60 FR 61311) to read as follows:

In an exception filed by Mr. Harmson, he stated that the provision that would allow the Board to acknowledge a national bargaining agency on behalf of growers should not be deleted from the proposed order. Bargaining associations are a form of group action in agriculture that contributes greatly to the economic well being of growers and adds an important dimension to representation of their interests in the marketplace.

As previously stated, the record evidence did not adequately explain how such a provision would work or what the benefits would be to growers. Also, the record evidence did not define the functions of a national bargaining association as related to the proposed marketing order. Therefore, Mr. Harmson's exception is denied.

Based upon the exception filed by Mr. Lee Schrepel, the findings and conclusions in material issue number 5(f) of the Recommended Decision concerning the authority to establish volume regulation provisions under the proposed order are amended by adding the following two paragraphs after the 23rd paragraph (60 FR 61312) to read as follows:

The exception filed by Mr. Lee Schrepel stated that ownership of the primary or secondary reserve should not be allowed to be transferred, but remain with the handler who had the initial reserve obligation.

Record evidence supported authorizing the transfer of a handler's equity in the primary reserve to another person. As previously stated, a handler may need to do this if, for example, such handler does not have the storage

area to store the primary reserve. Therefore, Mr. Schrepel's exception is denied.

Based upon the exception filed by CMI, the findings and conclusions in material issue number 5(f) of the Recommended Decision concerning the authority to establish volume regulation provisions under the proposed order are amended by adding the following paragraph after the seventh paragraph (60 FR 61311) to read as follows:

In CMI's exception, it stated that section 930.50(b) governing the application of the optimum supply formula in calculating preliminary free and restricted percentages was altered from the proponents' proposal. The proponents' proposal provided that tonnage requirements for the current crop year should be subtracted from the current year USDA crop forecast. The Recommended Decision provided that these numbers should be divided. This calculation would not work properly and is an inadvertent error by USDA. Therefore, it will be corrected in the amendatory language and CMI's exception is adopted.

Based upon the exception filed by CMI, the findings and conclusions in material issue number 5(f) of the Recommended Decision concerning the authority to establish volume regulation provisions under the proposed order are amended by adding the following paragraph after the 67th paragraph (60 FR 61316) to read as follows:

The exception filed by CMI indicated that section 930.52(d) should be corrected and clarified by removing the word ''maximum'' in the phrase ''maximum average annual processed production'' since this phrase is ambiguous and lacks clear meaning. One can either have a maximum annual production or an average annual production over the last five years, but not both. Therefore, section 930.52(d) should be modified by removing the word ''maximum'' and simply permit a district to drop out of volume regulation when its current crop is 50 percent less than the average crop processed over the prior five years. CMI's exception is adopted herein.

Based upon the exceptions filed by Mr. Rowley, Mr. Morrison, CMI, Mr. Mark Schrepel, and Mr. Lee Schrepel, the findings and conclusions in material issue number 5(f) of the Recommended Decision concerning the authority to establish volume regulation provisions under the proposed order are amended by adding the following eight paragraphs after the 59th paragraph (60 FR 61315) to read as follows:

The exception filed by Mr. Rowley stated that he was very concerned that the Recommended Decision did not authorize cherries used for drying as a diversion outlet. Mr. Rowley stated that his company had spent over $1,500,000 to develop dried cherries and dried cherry products. He believes that it would be grossly unfair that unregulated States could sell all their dried cherry products and he could not since dried cherries is not a diversion outlet.

Mr. Mark Schrepel's exception expressed concern that export would be prohibited as an exempt use or diversion outlet.

Mr. Morrison's exception requested that diversion credit be allowed for juice, exports and dried cherries. Mr. Morrison stated that companies have invested substantial sums to develop new markets and expand current markets dealing with juice, export and dried cherries. In CMI's exception, it requested that the USDA modify section 930.62 to include dried cherries that are exported, and cherries that are converted to juice.

Under section 930.59 of the proposed order, handler diversion can take place by several methods, including uses exempt under section 930.62. Section 930.62 provides that diverted cherries used for specific purposes may be exempt from certain provisions of the marketing order. These include exemption from assessment and volume control provisions.

Dried cherries or cherries designated for export can be exempted under § 930.62 from certain order provisions or can be allowed to qualify as diversion outlets under § 930.59. As specified under section 930.62, the Board can also designate other exempt uses. If the Board choose to designate export or dried cherries as an exempted use under § 930.62, export and dried cherries could also be specified as an eligible diversion outlet. Thus, such uses requested by the exceptions for diversion credit are not prohibited under the marketing order, except for cherries converted to juice or juice concentrate.

As previously discussed, record evidence supports the proposition that cherries converted to juice or juice concentrate cannot be used as an eligible diversion outlet. The arguments raised in the exceptions did not overcome the evidence in the record indicating that cherries converted to juice or juice concentrate cannot be used as an eligible diversion. This is mainly because of the possibility of oversupplies damaging the juice market already established by cherry producers and handlers in Oregon and Washington.

In addition, CMI's exception requested USDA to modify section 930.59(d) to clarify that the prohibition of juice or juice concentrate as an eligible handler diversion only prohibits the conversion of diverted cherries to juice or concentrate. CMI requested that the use of juice or juice concentrate for sales in export markets be eligible for diversion credit. As previously discussed, the prohibition of juice or juice concentrate for diversion credit, discussed in the Recommended Decision (60 FR 61316), would also apply to sales of juice or juice concentrate in export markets. This prohibition on diversion credit, however, does not preclude the export of free tonnage cherries that have been converted to juice or juice concentrate. Therefore, CMI's exception is denied.

Finally, Mr. Lee Schrepel's exception stated that there was an error in section 930.58(b) which referenced section 930.63 as exempted uses. Section 930.62 is the section in the marketing order that specifies the exempt uses. Therefore, section 930.58(b) should be corrected.

Based upon the exceptions filed by Mr. Frank and Mr. Facer, the findings and conclusions in material issue number 5(f) of the Recommended Decision concerning the authority to establish volume regulation provisions under the proposed order are amended by adding the following paragraph after the 68th paragraph (60 FR 61317) to read as follows:

In Mr. Frank's exception, he stated that tart cherries is a national crop and the oversupply is a national problem. Therefore, Washington, Oregon, Wisconsin and Pennsylvania should not be exempt from participating in the marketing order. These States comprise 17 percent of the total bearing acreage. Mr. Frank states that this is not an insignificant amount and to exempt these States from participating in the marketing order is not fair or right. In Mr. Facer's exception, he stated that he opposed the 15 million pound requirement tart cherry producing areas would have to meet to become regulated under the order. All tart cherry producing areas should be included or there should not be a marketing order. The above-mentioned States are not exempt from the marketing order. If the proposed order becomes effective, they would not be regulated under the order's proposed volume regulation because they do not meet the 15 million pound criteria. Should they meet the criteria in the future, they would become regulated. Handlers in all States would pay assessments for the administration of the order. The record evidence does not warrant volume

regulation in the States discussed by Mr. Frank or Mr. Facer, at this time. Therefore, Messrs. Frank's and Facer's exceptions are denied.

Based upon the exception filed by Mr. Facer, the findings and conclusions in material issue number 5(f) of the Recommended Decision concerning the authority to establish volume regulation provisions under the proposed order are amended by adding the following two paragraphs after the 23rd paragraph (60 FR 61312) to read as follows:

Mr. Facer expressed a concern that the proposed order would not protect individual producers' investments in processing/marketing cooperatives. He stated that many producers have made substantial investments in cooperatives to market their production while other producers have no such investments. It is his contention that the order will make all producers equal, allowing each to market the same portion of his/her crop.

The proposed order does not regulate producers. The order regulates only handlers of tart cherries. If a volume regulation is implemented, handlers would have to decide how to market their product, whether to withhold the required reserve or divert product, or both. Independent handlers and cooperatives would be making similar decisions concerning tart cherries to those they have made in the past when faced with overproduction. Such decisions would include identifying which producers' cherries to purchase, and which of those to utilize in various products and markets. The proposed marketing order is intended to bring supplies in line with current demand, thereby increasing returns to growers. Therefore, Mr. Facer's exception is denied.

Based upon the exception filed by Mr. Lee Schrepel, the findings and conclusions in material issue number 5(f) of the Recommended Decision concerning the authority to establish volume regulation provisions under the proposed order are amended by adding the following two paragraphs after the 20th paragraph (60 FR 61312) to read as follows:

Mr. Lee Schrepel's exception stated that the Board, even with the concurrence of the Secretary, should never have authority to modify the 50 million pound primary reserve limit. If a modification occurs, it should involve a proposal of modification to the Secretary followed by a comment period and State-by-State voting.

The record evidence supports the 50 million pound level specified in section 930.50(i). If the Board recommended a change to the 50 million pound level, it would have to be implemented through the formal rulemaking process which would require a public hearing and eventually a favorable vote by growers and processors to implement such change. State-by-State voting is not authorized under the Act nor is it supported by the record.

Based upon the exception filed by CMI, the findings and conclusions in material issue number 5(f) of the Recommended Decision concerning the authority to establish volume regulation provisions under the proposed order are amended by adding the following paragraph after the 16th paragraph (60 FR 61311) to read as follows:

The exception filed by CMI stated that there was an inconsistency in section 930.55(b) of the proposed order. The record evidence supported the concept that handlers could place cherries in any form in the inventory reserve. Handlers would have the option of choosing what form of inventory they wish to store. However, proposed section 930.55(b) states that the form to be used would be prescribed by the Board. This statement is inconsistent with the record evidence. Therefore, CMI's exception is adopted and appropriate modifications are made in section 930.55(b).

Based upon the exception filed by CMI, the findings and conclusions in material issue number 5(f) of the Recommended Decision concerning the authority to establish volume regulation provisions under the proposed order are amended by adding the following paragraph after the 15th paragraph (60 FR 61311) to read as follows:

The exception filed by CMI stated that section 930.53 should also apply to the modification, suspension, or termination of quality regulations along with volume regulations. This change would clarify the Board's responsibility to monitor crop and market conditions and recommend changes to existing regulations as necessary. Therefore, CMI's exception is adopted and appropriate modifications to section 930.53 have been made.

Based upon the exception filed by Mr. Lee Schrepel, the findings and conclusions in material issue number 5(f) of the Recommended Decision concerning the authority to establish volume regulation provisions under the proposed order are amended by adding the following paragraph after the 12th paragraph (60 FR 61311) to read as follows:

In Mr. Lee Schrepel's exception, he stated that the reference to the harvest season beginning in August (used as part of an illustration) was incorrect. Mr. Schrepel stated that the harvest season actually begins in mid-June and runs through mid-August. Mr. Schrepel's exception is correct.

Based upon the exception filed by Mr. Lee Schrepel, the findings and conclusions in material issue number 5(f) of the Recommended Decision concerning the authority to establish volume regulation provisions under the proposed order are amended by adding the following paragraph after the 52nd paragraph (60 FR 61314) to read as follows:

The exception filed by Mr. Lee Schrepel stated that grower diversion credit should not be given for fruit that is storm damaged. A diversion credit may be a marketable commodity, an item of value, and no such value should be accrued for unmarketable cherries. USDA did not include the proponents' proposal to authorize diversion credit for unharvestable or unmarketable fruit. The record evidence supported the proposition that growers should be allowed to receive diversion credit for marketable, harvestable fruit, even if some portion of such fruit was damaged by storm winds or floods. USDA has determined that the grower diversion program contained in the Recommended Decision could benefit the industry and believes that this finding is consistent with Mr. Schrepel's exception.

Based upon the exceptions filed by CMI and Mr. Lee Schrepel, the findings and conclusions in material issue number 5(f) of the Recommended Decision concerning the authority to establish volume regulation provisions under the proposed order are amended by adding the following 10 paragraphs after the 68th paragraph (60 FR 61317) to read as follows:

The exception filed by CMI stated that since USDA modified the provisions under section 930.52, the section may not now provide authority to subject additional districts to volume regulation once the initial group of volume regulated districts is established at the time of promulgation. CMI also proposes a new section 930.52 to replace section 930.52 that was published in the Recommended Decision. CMI objected to USDA removing a 150 percent trigger provision which would make districts that had a surge in production subject to volume control. USDA determined that such an additional criteria would be complicated for the Board to administer and possibly inequitable to growers and handlers.

CMI stated that, since the 150 percent trigger was removed from the proposal, the potential now exists for having up to 25 million pounds of unregulated

production. In a market of 250 million pounds, this amounts to 10 percent of unregulated production annually and an additional 10 percent could have a substantial impact upon markets and prices. CMI states that this emphasizes the need to have realistic production triggers. Also, CMI disagrees with USDA's conclusion that the dual triggers (150 percent and 15 million pounds) would somehow cause confusion and concern that a district could meet one criteria and not the other and still be regulated. CMI contends that the rules pertaining to the 15 million pound criteria and the 150 percent trigger are clear on the record, and therefore are not confusing.

CMI has proposed modifications to section 930.52 which would provide that: (1) Upon promulgation, those districts potentially subject to any imposed volume regulation would be those in which the average annual production of cherries over the prior three years, measured on a total production basis, has exceeded 15 million pounds of cherries and that handlers in districts not meeting this 15 million pound requirement at the time of order promulgation shall become subject to any volume regulation implemented in accordance with this part in the crop year that follows any three-year period in which the 15 million pound average production requirement is exceeded in that district; (2) If total production data is unavailable for a district, the Board would adjust the 15 million pound trigger upward or downward by a factor accounting for the historical difference between the total production and total utilization; and (3) When a district hits the 15 million pound trigger, it would be subject to regulation in the next crop year and remain regulated until the crop year following that in which its production drops below 15 million pounds over any three-year period subsequent to the year in which it hit the original 15 million pound threshold.

Regarding modification number one, USDA is adopting CMI's exception. This would clarify the intent and meaning of section 930.52 which should provide that after the initial regulation of districts that meet the 15 million pound test, additional districts may become regulated in the future.

Regarding modification number two, USDA is not adopting this exception. Such factors as proposed by CMI would be confusing and difficult to administer. If the order is promulgated, information needed to calculate each State's production would be collected under the marketing order. The marketing order provides for information collection from handlers that can be used for this purpose.

Finally, the third modification is also denied. This modification would lock a State in to being regulated for three years once it reaches the 15 million pound threshold. This was not the intent of USDA's modification to the Recommended Decision to delete the 150 percent trigger mechanism. USDA intended that States would become regulated in the year subsequent to when they reach 15 million pounds (computed as a rolling average of a three year period). Also, States would become unregulated in the year subsequent to when they fell below the 15 million pounds. The production of each State or district would be reviewed annually to determine if they would be regulated or not regulated in the upcoming crop year. Therefore, CMI's exception is denied on this issue.

In Mr. Lee Schrepel's exception, he stated that the Board should not have the authority to modify the 15 million pound requirement for volume regulation. If the Board decided to recommend modification of the 15 million pound level, such modification would have to be implemented through formal rulemaking procedures. This would require a public hearing and a favorable vote by growers and processors to implement such change.

Mr. Schrepel further stated that the proposal should be modified to facilitate that this trigger (15 million pound requirement) for imposition of volume regulations increase whenever it falls below 8 percent of the optimum supply. There is no support in the record for such proposition. Also, Mr. Schrepel did not specify why 8 percent was chosen and how this provision would work, therefore, his exception is denied.

Mr. Schrepel also requested clarification of when districts would become permanently regulated; would it be contingent upon the average of the previous three seasons? As previously discussed, no district would be regulated unless that district continued to have production above the 15 million pound requirement. Each year, the production of each district (based on a rolling 3-year average) would be evaluated to determine if such district would be regulated in the upcoming crop year.

Mr. Schrepel also requested that USDA specify the source of data for application of the trigger. USDA believes that the proponents intended that the Board use post-harvest production figures from each district. The Board can also obtain this information from USDA data and handler reports.

Based upon the exception filed by Mr. Lee Schrepel, the findings and conclusions in material issue number 5(f) of the Recommended Decision concerning the authority to establish volume regulation provisions under the proposed order are amended by adding the following paragraph after the 19th paragraph (60 FR 61312) to read as follows:

Mr. Lee Schrepel's exception stated under section 930.63(a) that referenced ''60 days prior to the end of the crop year'' appears to be open to interpretation by the reader. USDA disagrees with this statement. Crop year is defined under the marketing to mean the 12-month period beginning on July 1 of any year and ending on June 30 of the following year. Therefore, 60 days prior to the end of the crop year would mean April 30. Mr. Schrepel's exception is denied.

Based upon the exception filed by Mr. Lee Schrepel, the findings and conclusions in material issue number 5(h) of the Recommended Decision concerning the additional terms and conditions which are common to all marketing orders are amended by adding the following five paragraphs after the sixth paragraph (60 FR 61318) to read as follows:

Mr. Lee Schrepel's exception stated that a continuance referendum every sixth year is not frequent enough. The industry should be able to petition the Secretary to hold a continuance referendum more frequently.

The record evidence supported the conduct of a continuance referendum at least every six years among growers and processors in the industry to determine if they favor continuance of the order. This is also consist with Departmental guidelines that endorse a continuance referendum every six years. The Secretary is not prevented from holding a continuance referendum at an earlier date if such referendum is deemed necessary. Therefore, Mr. Schrepel's exception is denied.

Mr. Schrepel also stated that the standards or criteria should be as stringent for continuance of the order as it is for the initial promulgation. As was indicated in the Recommended Decision, it was contemplated that the criteria for continuance of the order would be based on a two-thirds affirmative vote by number or volume represented in the referendum. This standard would be similar to the promulgation standard. In any event, the Secretary would still have discretionary authority in deciding whether to continue the order. Therefore, Mr. Schrepel's exception is denied.

Mr. Schrepel also stated that section 930.91 should include provisions for the initiation of an amendment from a source within the industry other than the Board. Mr. Schrepel stated that incidents may occur and the Board may not choose to act on a matter that may be of considerable importance to an industry segment. The language in section 930.91 is standard language which is found in other orders and does not preclude anyone from recommending amendments.

The Secretary relies on the Board to make recommendations that are important to the welfare of the industry. If one segment of the industry is concerned about an issue, it should be brought to the Board to be addressed. Any person can submit recommendations to the Secretary for consideration. If the Secretary does conclude that formal rulemaking is necessary based on a Board recommendation or other recommendations, other persons will also have the opportunity to submit proposals. In addition, the Secretary may propose amendments, even in the absence of outside recommendations. Therefore, Mr. Schrepel's exception is denied.

In addition, to the exceptions filed and discussed above, CMI filed an exception that included some typographical errors in the amendatory language of the proposed order. Those changes are adopted in the amendatory language below. They are:

(1) Section 930.11—Add the words ''for his or her own account'' at the end of the definition.

(2) Section 930.15—cross sectional references are incorrect that refer to the primary and secondary reserve.

(3) Section 930.17—cross sectional reference is incorrect that refers to the primary and secondary reserve.

(4) Section 930.25—the phrase ''reapportionment or'' should be added to make this section consistent with other changes that were made.

(5) Section 930.51—A comma and the word ''this'' were left out of the proposal.

(6) Section 930.55(a)—cross sectional reference is incorrect that refers to equity holders.

(7) Section 930.57(a)—cross sectional reference is incorrect that refers to equity holders.

(8) Section 930.58(b)—cross sectional reference is incorrect that refers to exemptions.

(9) Section 930.58(b)(i)—add an ''and'' at the end of the paragraph.

(10) Section 930.60—Change ''sole property'' to sole responsibility.''

Also, in his exception, Mr. Lee Schrepel pointed out some typographical errors and omissions of words in the Recommended Decision. They are: (1) the dates of the Grand Rapids, Michigan hearing session were incorrectly listed (60 FR 61292) and should be changed from January 9 and 10, 1995, to January 18 and 19, 1995, respectively; (2) in the description of small agricultural producers as those entities having annual receipts of less than $500,000 (60 FR 61293), the words ''less than'' were inadvertently omitted and should be added; and, (3) the listings of U.S. bearing acreage of tart cherries (60 FR 61293) in 1986 and 1990 were incorrectly stated and should be changed from 4.5 million and 5 million, respectively, to 45,000 and 50,000, respectively.

USDA has modified sections 70(c) to make that provision consistent with authorities provided under this proposed order and other Federal marketing orders. In addition, where necessary, USDA has made minor conforming changes to ensure that all sections of this part accurately reflect the modifications adopted in this decision.

Rulings on Exceptions

In arriving at the findings and conclusions and the regulatory provisions of this decision, the exceptions to the Recommended Decision were carefully considered in conjunction with the record evidence. To the extent that the findings and conclusions and the regulatory provisions of this decision are at variance with the exceptions, such exceptions are denied.

Marketing Agreement and Order

Annexed hereto and made a part hereof is the document entitled ''Order Regulating the Handling of Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin.'' This document has been decided upon as the detailed and appropriate means of effectuating the foregoing findings and conclusions.

It is hereby ordered, That this entire decision be published in the Federal Register.

Referendum Order

It is hereby directed that a referendum be conducted in accordance with the procedure for the conduct of referenda (7 CFR 900.400) to determine whether the issuance of the annexed order regulating the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin is approved or favored by growers and processors, as defined under the terms of the order, who, during the representative period were engaged in the production or processing of tart cherries in the proposed production area.

The representative period for the conduct of such referendum is hereby determined to be July 1, 1995, through May 31, 1996.

The agents of the Secretary to conduct such referendum are hereby designated to be Gary D. Olson and Robert J. Curry, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, 1220 S.W. Third Avenue, room 369, Portland, Oregon 97204; telephone 503–326–2724, FAX 503–326–7440.

List of Subjects in 7 CFR Part 930

Marketing agreements, Tart cherries, Reporting and recordkeeping requirements.

Dated: May 22, 1996.

Shirley R. Watkins,

Deputy Assistant Secretary, Marketing and Regulatory Programs.

Order Regulating the Handling of Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin [1]

Findings and determinations upon the basis of the record. Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), and the applicable rules of practice and procedure effective thereunder (7 CFR part 900), a public hearing was held upon 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.

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

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

(2) The marketing agreement and order regulate the handling of tart cherries grown in the production area 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 hearings have been held;

[1] This order shall not become effective unless and until the requirements of section 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

(3) The marketing agreement and order 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 subdivisions of the production area would not effectively carry out the declared policy of the Act;

(4) There are no differences in the production and marketing of tart cherries produced in the production area which make necessary different terms and provisions applicable to different parts of such area; and

(5) All handling of tart cherries grown in the production area is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

Order Relative to Handling

It is therefore ordered, That on and after the effective date hereof, all handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, shall be in conformity to, and in compliance with, the terms and conditions of the said order, as follows:

The provisions of the proposed marketing agreement and order contained in the Recommended Decision issued by the Administrator on November 20, 1995, and published in the Federal Register on November 29, 1995 [60 FR 61292], as revised herein, shall be and are the terms and provisions of this agreement and order. Sections 930.92 through 930.94 apply only to the proposed marketing agreement and not the proposed order.

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

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

Subpart A—Order Regulating Handling

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Subpart B—[Reserved]

Authority: 7 U.S.C. 601–674.

Subpart A—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 cerasas,* or hybrids of *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.

(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.

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

(d) The sale or transportation of cherries by a grower to a handler of record within the production area.

(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 for his or her own account.

§ 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 § 930.55 or § 930.57 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 § 930.57.

§ 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 order to achieve a fair and balanced representation on the Board, and to prevent any one sales constituency from gaining control of the Board, not more than one Board member may be from, or affiliated with, a single sales constituency in those districts having more than one seat on the Board. 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 or grower 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 three 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, or 3 fiscal years, in both instances, 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 6 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) *Forms and ballots.* 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. The requirement that the petition form be signed by a handler other than the nominee shall not apply in any District where less than two handlers are eligible to vote.

(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 public member and alternate public member is nominated by the Board pursuant to § 930.23(d) and shall also be subject to appointment by the Secretary. The Secretary shall appoint from nominees by the Board or from other qualified individuals the public member and the alternate public member.

§ 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 reapportionment or 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 financial statements 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. 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 USDA, 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 paragraph (a) of this section, 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 subtracted 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; and

(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 paragraph (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 this 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 in which handlers shall be 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. Handlers in districts not meeting the 15 million pound requirement at the time of order promulgation shall become subject to volume regulation implemented in accordance with this part in the crop year that follows any three-year period in which the 15 million pound average

production requirement is exceeded in that district.

(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 described in paragraph (a) of this section 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 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 regulations issued pursuant to §§ 930.44 or 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 regulation issued pursuant to §§ 930.44 or 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 § 930.59, 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 chosen by the handler, 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 USDA. 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 § 930.59.

(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 § 930.62; nonhuman food uses; or other uses, including diversion by leaving such cherries unharvested.

(c) *Application/mapping.* The Board, with the approval of Secretary, shall develop rules and regulations providing for the diversion of cherries by growers. Such regulations may include, among other things: (1) The form and content of applications and agreements relating to the diversion, including provisions for supervision and compensation; and (2) provisions for mapping areas in which cherries will be left unharvested.

(d) *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.

(c) *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.

(d) *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.

(e) *Diversion certificate.* The Board shall conduct such supervision of the handler's diversion of cherries under paragraph (c) or under paragraph (d) 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 responsibility 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, § 940.44, § 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 to any person designated by the Board or by the Secretary, 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;

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

(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 to exercise any powers granted by the Act or otherwise, or, in accordance with such powers, to act in the premises whenever such action is deemed advisable.

§ 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.

§ 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.

Subpart B—[Reserved]

Dated: May 22, 1996.

Shirley R. Watkins,

Deputy Assistant Secretary, Marketing and Regulatory Programs.

[FR Doc. 96–13383 Filed 5–24–96; 8:45 am]

BILLING CODE 3410–02–P