

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

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

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

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

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

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

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

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

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

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

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

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

**Preliminary Statement**

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

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

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

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

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

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