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

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

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

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

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

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

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

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

In a brief submitted on behalf of the Oregon Tart Cherry Association, Mr. Lee Schrepel contended that the proponents failed to offer convincing evidence that the benefits derived from the proposed order would exceed the costs for participants in an equitable manner. Mr. Schrepel stated that the record shows that Oregon growers are likely to bear comparatively greater costs than other districts proposed to be regulated under the order. Any potential increase in grower prices would be tempered by inventory reserves which would tend to depress the market. There is no evidence to support Mr. Schrepel's contention that Oregon would bear greater costs than the other districts. Inventory reserves would be held off the market and slowly released when needed. Order imposed mechanisms would prevent their release until they are needed in the market, preventing the exact type of market depression unregulated carryovers now cause. Mr. Schrepel's other concerns have been addressed under material issue number 5(c).

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

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

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

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