

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

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

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

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

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

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

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

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

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

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

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

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

Miscellaneous conforming and clarifying changes have also been made.

Rulings on Proposed Findings and Conclusions

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

General Findings

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

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

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

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