

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 945

[Docket No. A0-150-A6; FV92-945-2FR]

Irish Potatoes Grown in Certain Designated Counties in Idaho, and Malheur County, Oregon; Order Further Amending Marketing Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule further amends the marketing agreement and order for potatoes grown in Idaho-Eastern Oregon (order). The amendments include authority to: regulate shipments of potatoes within the production area, change representation and quorum procedures of the committee, set container marking and labeling requirements, and require the committee to consider, at least every six years, changes in committee size or reapportionment of committee membership. Also, they change committee fiscal operations, add confidentiality and verification provisions to the order, and make other miscellaneous changes that are consistent with the amendments. These changes were favored by the subject potato producers in a referendum held from April 3-17, 1995. The amendments will improve the administration, operation and functioning of the marketing order program.

EFFECTIVE DATE: May 31, 1995.

FOR FURTHER INFORMATION CONTACT: Gary Olson, OIC, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, 1220 S.W. Third Avenue, room 369, Portland, Oregon 97204; telephone: 503-326-2725, or Fax 503-326-7440; or Valerie L. Emmer or Jim Wendland, Marketing Specialists, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, room 2523-S, P.O. Box 96456, Washington, D.C. 20090-6456, telephone: 202-205-2829 or 720-2170 respectively, or FAX 202-720-5698.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding: Notice of Hearing issued on August 3, 1993, and published in the **Federal Register** on August 11, 1993 (58 FR 42696). Recommended Decision and Opportunity to File Written Exceptions issued on November 23, 1994, and published in the **Federal Register** on November 30, 1994 (59 FR 61286). Secretary's Decision and Referendum

Order issued March 3, 1995, and published in the **Federal Register** on March 10, 1995 (60 FR 13080).

Preliminary Statement

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.

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. This action is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this action.

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.

The final rule was formulated on the record of a public hearing held in Idaho Falls, Idaho, on September 8, 1993, to consider the proposed amendment of the Marketing Agreement and Order No. 945, regulating the handling of potatoes grown in designated counties in Idaho, and Malheur County, Oregon, hereinafter referred to collectively as the "order." Notice of the hearing was published in the August 11, 1993, issue of the **Federal Register** (58 FR 42696).

The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), hereinafter referred to as the Act, and the applicable rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders (7 CFR part 900). The Notice of Hearing contained several amendment proposals submitted by the Idaho-Eastern Oregon Potato Committee (committee) established under the order to assist in local administration of the program.

The proposals pertained to: (1) Redefining "ship or handle" to include

shipments of potatoes within the production area; (2) providing seed producers with representation on the committee and adding authority for the committee to recommend to the Secretary changes in the committee size and composition; (3) updating committee representation districts to show the counties currently in each district; (4) requiring the committee to consider, at least every six years, whether to recommend changes in committee size or reapportionment of committee membership; (5) changing committee quorum procedures; (6) removing an outdated assessment limitation of \$1 per carload and allowing the committee to impose late payment or interest fees, or both, on late assessment payments, accept advance payments, and borrow monies in an extreme emergency for program administration; (7) adding authority for the committee to recommend container marking and labeling requirements; and (8) specifying confidentiality requirements for handler reports submitted to the committee. The Department of Agriculture proposed authority for adding requirements regarding verification of reports and to make any necessary conforming changes.

Upon the basis of evidence introduced at the hearing and the record thereof, the Acting Assistant Secretary, Marketing and Regulatory Programs, on March 2, 1995, filed with the Hearing Clerk, U.S. Department of Agriculture, a Secretary's Decision and Referendum Order, directing that a referendum be conducted during the period April 3-17, 1995, among producers of Idaho-Eastern Oregon Potatoes to determine whether they favored the proposed amendments to the order. In the referendum, all amendment proposals were favored by more than two-thirds of the producers voting in the referendum. Accordingly, all proposed amendments are included in this order further amending the order.

The amended marketing agreement was subsequently mailed to all potato handlers in the production area for their approval. The marketing agreement was signed by potato handlers representing more than 50 percent of the volume of potatoes handled by all handlers during the representative period of August 1, 1993, to July 31, 1994.

Small Business Considerations

In accordance with the provisions of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Administrator of the Agricultural Marketing Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Small agricultural service firms, which include handlers regulated under this order, have been defined by the Small Business Administration (SBA) (13 CFR 121.601) as those having annual receipts of less than \$5,000,000. Small agricultural producers are defined as those having annual receipts of less than \$500,000.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders and rules issued thereunder are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both the RFA and the Act have small entity orientation and compatibility. Interested persons were invited to present evidence at the hearing on the probable impact that the proposed amendments to the order would have on small businesses.

During the 1992-93 crop year, 66 handlers were regulated under Marketing Order No. 945. In addition, there are about 1,600 producers of potatoes in the production area. The Act requires the application of uniform rules on regulated handlers. Since handlers covered under the potato marketing order are predominantly small businesses, the order itself is tailored to the size and nature of these small businesses. Marketing orders and amendments thereto, are unique in that they are normally brought about through group action of essentially small entities for their own benefit. Thus, both the RFA and the Act are compatible with respect to small entities.

This final rule amends certain provisions of the order including:

§ 945.20 Establishment and membership pertaining to operations of the committee, including providing seed producers representation on the committee; § 945.23 Redistricting and reapportionment authorizing changes in committee size, composition, and representation; § 945.30 Procedure regarding quorum requirements; and § 945.42 Assessments removing a \$1 per carload maximum assessment rate and allowing the committee to impose late payment and interest fees on late assessment payments and borrow monies in an extreme emergency for program administration. The record indicates these changes will provide an opportunity for a broader based representation on the committee and more flexibility to adjust to future changes in industry structure, potato production and financial operations. These changes are also designed to enhance the administration and

functioning of the order and will have negligible, if any, economic impact on small businesses.

This final rule amends § 945.9 Ship or handle by revising the definition of these terms to include the handling of potatoes in the current of commerce within the counties covered by the order's production area, broadening the scope of the order. This will require all regulated shipments of potatoes for fresh market to be inspected and meet order requirements, including grade, size, quality, pack, and payment of assessments. This final rule will improve the market for potatoes handled within the production area. This will benefit both producers and handlers because minimum grade, size and quality requirements established under the order are important to the industry in fostering consumer satisfaction, increasing the demand for Idaho-Eastern Oregon potatoes, and improving industry returns; and the additional assessment income would improve the financial operations of the order. Any added burden on small businesses should be outweighed by the added benefits accruing to them.

The change to allow the rate of assessment to be based on a hundredweight of potatoes rather than an outdated maximum amount of \$1 per railroad carload will improve the financial operations of the order and not adversely impact small businesses. This change will provide more efficient funding of order operations and activities. Fresh potato shipments have stabilized in recent years and the current maximum rate specified will likely not be sufficient to properly fund committee operating costs beyond the next few years if costs continue to rise.

Another change will amend § 945.52 Issuance of regulations to add authority to require accurate and uniform marking and labeling of the containers in which production area potatoes are shipped. The benefits of the expected higher returns that could result from increases in buyer and consumer satisfaction due to accurate marking and labeling should outweigh any potential burden on small businesses.

Another amendment, to § 945.80 Reports, will provide confidentiality requirements for reports submitted to the committee. This will safeguard handlers' proprietary information, including that for small businesses, without imposing any burden on them. Additionally, new § 945.80 provisions will add authority for the Secretary and the committee to verify the correctness of reports filed by handlers, and to verify handler compliance with recordkeeping requirements. The

requirement will not have a significant impact on small entities in the industry.

The final rule to make other miscellaneous changes that will be consistent with the changed amendments is necessary so that all sections of the order will be consistent. These changes include deleting and redesignating certain sections of the order.

All these changes are designed to enhance the administration and functioning of the marketing agreement and order to the benefit of the industry. Accordingly, it is determined that the revisions of the order will not have a significant economic impact on handlers or producers.

In compliance with Office of Management and Budget (OMB) regulations (5 CFR Part 1320) which implement the Paperwork Reduction Act of 1980 (44 U.S.C. 35), any reporting and recordkeeping requirements that may result from these amendments will be submitted to OMB for approval.

List of Subjects in 7 CFR Part 945

Marketing agreements, Potatoes, Reporting and recordkeeping requirements.

Order Further Amending the Order Regulating the Handling of Irish Potatoes Grown in Certain Designated Counties in Idaho, and Malheur County, Oregon

Findings and Determinations

The findings and determinations hereinafter set forth are supplementary and in addition to the findings and determinations previously made in connection with the issuance of the order; and all of said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

(a) *Findings and Determinations Upon the Basis of the Hearing 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 the amendments to the Marketing Agreement and Order No. 945 (7 CFR part 945), regulating the handling of Irish potatoes grown in certain designated counties in Idaho, and Malheur County, Oregon.

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

(1) The order, as amended, as hereby further amended, and all of the terms

and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The order, as amended, as hereby further amended, regulates the handling of Irish potatoes grown in the production area in the same manner as, and is applicable only to persons in the respective classes of commercial and industrial activity specified in the marketing order upon which hearings have been held;

(3) The order, as amended, as hereby further amended, is limited in 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) The order, as amended, as hereby further amended, prescribes, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of potatoes grown in the production area; and

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

(b) *Additional findings.* It is necessary and in the public interest to make these order amendments effective not later than May 31, 1995.

A later effective date would unnecessarily delay the implementation of the order amendments and the improvement in operation of the marketing order program. The committee, producers and handlers need as much time as possible to make plans to implement the amended order and discuss needed changes to its handling regulation and committee operating procedures before its June 6, 1995, annual organizational meeting, when it recommends actions for the fast approaching 1995-96 season. The harvesting and marketing of the 1995 crop is expected to begin in August 1995. Hence, Department and industry implementation activities must begin promptly. Some of the committee recommendations for the 1995-96 season will require informal rulemaking by the Department to be implemented.

In view of the foregoing, it is hereby found and determined that good cause exists for making these order amendments effective May 31, 1995, and that it would be contrary to the public interest to delay the effective date of these order amendments for 30 days after its publication in the **Federal**

Register (Sec. 553(d), Administrative Procedure Act; 5 U.S.C. 551-559).

(c) *Determinations.* It is hereby determined that:

(1) Handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping potatoes covered by the said order, as amended, as hereby further amended) who, during the period August 1, 1993, through July 31, 1994, handled 50 percent or more of the volume of such potatoes covered by the said order, as amended, as hereby further amended, have signed an amended marketing agreement; and

(2) The issuance of this amendatory order, further amending the aforesaid order, is favored or approved by at least two-thirds of the producers who participated in a referendum on the question of its approval and who, during the period August 1, 1993, through July 31, 1994 (which has been deemed to be a representative period), have been engaged within the Idaho-Eastern Oregon Potato production area in the production of such potatoes for fresh market.

Order Relative to Handling

It is therefore ordered, That on and after the effective date hereof, all handling of Irish potatoes grown in certain designated counties in Idaho, and Malheur County, Oregon, shall be in conformity to, and in compliance with, the terms and conditions of the said order as hereby further amended as follows:

The provisions of the proposed marketing order amendments further amending the order contained in the Recommended Decision issued by the Administrator on November 23, 1994, and published in the **Federal Register** on November 30, 1994 (59 FR 61286), and in the Secretary's Decision issued on March 2, 1995, and published in the **Federal Register** on March 10, 1995 (60 FR 13080), shall be and are the terms and provisions of this order further amending the order, and are set forth in full herein.

PART 945—IRISH POTATOES GROWN IN CERTAIN DESIGNATED COUNTIES IN IDAHO, AND MALHEUR COUNTY, OREGON

1. The authority citation for 7 CFR part 945 continues to read as follows:

Authority: 7 U.S.C. 601-674.

2. Section 945.9 is revised as follows:

§ 945.9 Ship or handle.

Ship or handle means to pack, sell, consign, transport or in any other way to place potatoes grown in the

production area, or cause such potatoes to be placed, in the current of commerce within the production area or between the production area and any point outside thereof, so as to directly burden, obstruct, or affect any such commerce: *Provided,* That the definition of *ship or handle* shall not include the transportation of ungraded potatoes within the production area for the purpose of having such potatoes stored or prepared for market, except that the committee may impose safeguards pursuant to § 945.53 with respect to such potatoes.

3. Section 945.20 is amended by revising paragraph (a) and adding a new paragraph (d) to read as follows:

§ 945.20 Establishment and membership.

(a) The Idaho-Eastern Oregon Potato Committee is hereby established consisting of eight members, of whom four shall currently be producers of potatoes for the fresh market who produced such potatoes during at least three of the last five years; at least one member shall be a producer predominately of potatoes for seed during a similar period; and three shall be handlers. For each member of the committee, there shall be an alternate who shall have the same qualifications as the member. The number of producer and/or handler members and alternates on the committee may be increased and the composition of the committee between producers and handlers may be changed as provided in § 945.23.

* * * * *

(d) At least every six years, the committee shall review committee size, composition, and representation and recommend to the Secretary whether changes should be made, as provided in § 945.23.

4. Sections 945.22 through 945.24 are revised to read as follows:

§ 945.22 Districts.

For the purpose of selecting committee members and alternate members, the following districts of the production area are hereby established: *Provided,* That these districts may be changed as provided in § 945.23.

(a) *District No. 1:* The counties of Bonneville, Butte, Clark, Fremont, Jefferson, Madison, and Teton;

(b) *District No. 2:* The counties of Bannock, Bear Lake, Bingham, Caribou, Franklin, Oneida, and Power; and

(c) *District No. 3:* Malheur County, Oregon, and the remaining designated counties in Idaho included in the production area, and not included in District No. 1 or District No. 2.

§ 945.23 Redistricting and reapportionment.

(a) The Secretary, upon recommendation of the committee, may reestablish districts within the production area, may reapportion committee membership among the various districts, may increase the number of producer and/or handler members and alternates on the committee, and may change the composition of the committee by changing the ratio between producer and handler members, including their alternates. At least every six years, the committee shall review committee size, composition and representation and recommend to the Secretary whether changes should be made. In recommending any such changes, the committee shall give consideration to:

- (1) Shifts in potato acreage within districts and within the production area during recent years;
- (2) the importance of new potato production in its relation to existing districts;
- (3) the equitable relationship between committee membership and districts;
- (4) economies to result for producers in promoting efficient administration due to redistricting or reapportionment of members within districts; and
- (5) other relevant factors.

(b) Membership of the committee shall be apportioned among the districts of the production area so as to provide the following representation or such other representation as recommended by the committee and approved by the Secretary:

- (1) Three producer members, including at least one who predominately produces seed potatoes, and one handler member, with their respective alternates, from District No. 1;
- (2) One producer member and one handler member, with their respective alternates, from District No. 2; and
- (3) One producer member and one handler member, with their respective alternates, from District No. 3.

§ 945.24 Selection.

Members and alternates of the committee shall be selected by the Secretary on the basis specified in § 945.23 (b) from nominations made pursuant to § 945.25 or from other eligible persons.

5. In § 945.30, paragraph (a) is revised to read as follows:

§ 945.30 Procedure.

(a) A simple majority of all members of the committee, including alternates acting for members, shall be necessary to constitute a quorum or to pass any motion or approve any committee action, except any motion regarding a change in committee size shall require a unanimous vote. At any assembled meeting, all votes shall be cast in person.

* * * * *

6. In § 945.42, paragraph (b) is revised and new paragraphs (d) and (e) are added to read as follows:

§ 945.42 Assessments.

* * * * *

(b) Assessments shall be levied upon handlers at a rate per hundredweight of potatoes or equivalent established by the Secretary. Such rate may be established upon the basis of the committee's budget recommendations, and other available information.

* * * * *

(d) The committee may impose a late payment charge or an interest charge, or both, on any handler who fails to pay, on or before the due date established by the Secretary, the total assessment for which such handler is liable. Such due date and the late payment fee and interest rate shall be recommended by the committee and approved by the Secretary.

(e) In order to provide funds to carry out its function, after the effective date of this subpart the committee may accept advance assessments from handlers. Advance assessments received from a handler shall be credited toward assessments levied against that handler during that fiscal period. In the case of an extreme emergency, the committee may also borrow money on a short term basis to provide funds for the administration of this part. Any such borrowed money shall only be used to meet the committee's current financial obligations, and the committee shall repay all borrowed money by the end of the next fiscal period from assessment income.

7. In § 945.52, paragraph (a)(3) is revised to read as follows:

§ 945.52 Issuance of regulations.

(a) * * *

(3) Fix the size, capacity, weight, dimensions, pack, labeling or marking of the container, or containers, which may be used in the packaging or handling of potatoes, or both; or

* * * * *

8. Section 945.80 is amended by designating the existing undesignated text as paragraph (a) and adding new paragraphs (b) through (d) to read as follows:

§ 945.80 Reports.

* * * * *

(b) All data or other information constituting a trade secret, or disclosing a trade position or business condition of a particular handler shall be treated as confidential and shall at all times be received by and kept in the custody and under the control of one or more designated employees of the committee. Information which would reveal the circumstances of a single handler shall be disclosed to no person other than the Secretary.

(c) Each handler shall maintain for at least two succeeding fiscal periods such records of potatoes received and of potatoes disposed of by such handler as may be necessary to verify reports required pursuant to this section. The committee, with the approval of the Secretary, may prescribe rules and regulations issued pursuant to this section specifying handler records and reports which the committee may need to perform its functions.

(d) For the purpose of assuring compliance and checking and verifying reports filed by handlers, the Secretary and the committee, through its duly authorized agents, shall have access to any premises where applicable records are maintained, where potatoes are held, 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.

Dated: May 31, 1995.

Patricia Jensen,

Acting Assistant Secretary, Marketing and Regulatory Programs.

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