

*What are the next steps after the recommended decision?*

USDA will evaluate the exceptions and, if it is decided to continue with the proceeding, a Secretary's Decision and Referendum Order will be issued. A producer referendum will be conducted and will include all affected producers. The referendum will be conducted by mail ballot, and producers can vote on each material issue presented. There are seven material issues in this recommended decision.

To become effective, the amendments require approval of two-thirds of the producers voting in the referendum or approval by two-thirds of the volume of production represented by the producers voting in the referendum. If the vote favors any or all of the amendments, the Department prepares a final order effectuating the amendments.

**Preliminary Statement**

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to the proposed amendment of Marketing Agreement No. 134 and Marketing Order No. 923, regulating the handling of sweet cherries grown in designated counties in Washington, (hereinafter referred to as the order), and the opportunity to file written exceptions thereto.

This action is issued 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 the formulation of marketing agreements and orders (7 CFR Part 900).

The proposed amendment of Marketing Agreement No. 134 and Order No. 923 is based on the record of a public hearing held in Yakima, Washington, on November 16, 1999. Notice of this hearing was published in the **Federal Register** on November 8, 1999. The notice of hearing contained proposals submitted by the Committee and the Department.

The Committee's proposed amendments would: Increase the production area to cover the area in the State of Washington east of the Cascade Mountain Range, redefine the districts currently established under the order and allow for special purpose shipments of cherries to packing operations outside the production area; Increase representation on the Committee by adding an additional handler member; Provide for late payment and interest charges on delinquent assessments; Authorize establishment of container marking requirements; and Allow

prospective Committee members and alternates to qualify for membership by filing a single form.

Also, AMS proposed to establish a limit on the number of consecutive terms a person may serve as a member on the Committee and to require that continuance referenda be conducted on a periodic basis to ascertain industry support for the order.

At the conclusion of the hearing, the Administrative Law Judge fixed January 20, 2000, as the final date for interested persons to file proposed findings and conclusions or written arguments and briefs based on the evidence received at the hearing. None were filed.

**Material Issues**

The material issues of record addressed in this decision are as follows:

(1) Whether to increase the production area to cover the area in the State of Washington east of the Cascade Mountain Range; to redefine the districts established under the order; and to authorize special purpose shipments, with appropriate safeguards, allowing movement of cherries to packing facilities outside the production area;

(2) Whether to increase representation on the Committee by adding one additional handler member;

(3) Whether to authorize the Committee, with USDA approval, to collect late payment and interest charges on delinquent assessments;

(4) Whether to authorize the Committee, with USDA approval, to establish container marking requirements;

(5) Whether to authorize Committee nominees to qualify as a member or alternate by filing a written acceptance of willingness to serve prior to the selection;

(6) Whether to establish a limit on the number of consecutive terms a person may serve as a member on the Committee; and

(7) Whether to require that continuance referenda be conducted on a periodic basis to ascertain industry support for the order.

**Findings and Conclusions**

The findings and conclusions on the material issues, all of which are based on evidence presented at the hearing and the record thereof, are:

*Material Issue Number 1*

The definition of production area under § 923.4 should be amended to include the counties of Okanogan, Chelan, Kittitas, Yakima, Klickitat in the State of Washington and all of the

counties in Washington lying east thereof and § 923.14 should be amended to include the additional counties in the two districts established under the order. In addition, § 923.54 should be amended to authorize special purpose shipments, with appropriate safeguards, allowing movement of cherries to packing operations outside the production area.

Currently, the production area includes only the counties of Okanogan, Chelan, Douglas, Grant, Yakima and Benton in the State of Washington. District 1 includes the counties of Chelan, Okanogan, Douglas and Grant. District 2 includes the counties of Yakima and Benton. There are no provisions in the current order that authorize uninspected cherries to be shipped outside the production area for packing.

The marketing order was promulgated in 1957. At that time, the primary objective of the order was to provide consumers with a uniform product so that buyers were assured of quality. The order has never been amended. Since that time, many changes have occurred in the sweet cherry industry. New areas of production have developed and marketing practices have changed. For example, Franklin County is not currently regulated under the marketing order, but reports indicate that sweet cherry trees have been planted in that county in recent years. This is true in other non-regulated counties as well. If 12 counties in the State of Washington are producing cherries in significant volume, and only 6 are regulated under the order, inconsistencies in quality could occur which could impact the current high quality image of Washington sweet cherries. The proposed amendment intends to update the order to reflect this change. The proposed amendment also would redefine the districts established under the order to include the new counties in the existing districts.

In addition, many of the cherries grown in the counties proposed to be added to the production area are currently packed in Oregon. If the production area is expanded to include these counties, it is recommended that sweet cherry shipments be authorized outside the production area to these packing facilities for preparing for market. This would be done under the special purpose authority contained in § 923.54 of the order. Grower/handlers could deliver cherries to those Oregon packing operations that agree to abide by the marketing order requirements for such cherries, including obtaining inspections and paying assessments. The Committee would establish

safeguards to ensure that marketing order requirements are being met.

#### Expansion of Production Area

When the order was created in 1957, sweet cherries were primarily grown in only 6 counties in the State of Washington. The 6 counties that are currently regulated are Okanogan, Chelan, Douglas, Grant, Benton and Yakima. The 14 additional counties proposed for inclusion are Kittitas, Klickitat, Ferry, Stevens, Pend Oreille, Lincoln, Spokane, Adams, Whitman, Franklin, Walla Walla, Columbia, Garfield and Asotin.

Cherry production has dramatically increased in areas within the State of Washington that are outside the current production area. As more land has come into irrigation and farmers look for alternative crops to grow, sweet cherry production is expected to continue to increase in areas outside the current production area.

The total production of sweet cherries in Washington was reported by the National Agricultural Statistics Service (NASS), USDA to be 96,000 tons in 1998 and 95,000 tons in 1997. Production by county is not available. However, NASS does report production information by Fruit Reporting Districts and this information is available annually for 1993 through 1997.

The West Fruit Reporting District produces a minimal amount of sweet cherries (50 tons per year) and is not proposed to be included in the order's production area. In addition to the low level of production, testimony revealed that, due to weather conditions, it would be unlikely that cherries could be commercially produced in significant amounts west of the Cascade Mountain Range in Washington. Average production in this area is 50 tons per year. Testimony indicated that excessive rain causes serious quality problems with sweet cherries, such as cracking. Generally, weather conditions in eastern Washington are more favorable for growing sweet cherries, as well as other horticultural crops.

The Mid-Columbia Fruit Reporting District includes the counties of Wahkiakum, Cowlitz, Clark, Skamania, and Klickitat. These counties produced an average of 1,550 tons during the 1993 though 1997 seasons. Only Klickitat County would be included in the proposed regulated area. The other four counties are in the western part of the State and have minimal sweet cherry production and no potential for significant production. These counties not included in the proposed production area have weather

conditions similar to the counties in the West Fruit Reporting District.

The Wenatchee Fruit Reporting District includes the counties of Okanogan, Chelan, and Douglas. This is one of the two biggest sweet cherry producing districts with an average production of 34,360 tons from 1993 through 1997. These three counties are currently regulated under the federal marketing order.

The Yakima Valley Fruit Reporting District is the other large sweet cherry producing district with an average production of 35,830 tons from 1993 through 1997. Yakima County is currently regulated, while Kittitas County is proposed for inclusion in the regulated area.

The Columbia Basin Fruit Reporting District includes the counties of Grant, Adams, and Franklin. Grant is currently regulated under the federal marketing order, while Adams and Franklin counties are proposed additions to the regulated area. The Columbia Basin Fruit Reporting District averaged 3,410 tons annually over the past 5 seasons.

The Northeast Fruit Reporting District is made-up of Ferry, Stevens, Pend Oreille, Lincoln, and Spokane counties. The average annual production from this fruit-reporting district is 100 tons. All of these counties would be included in the proposed production area.

The Southeast Fruit Reporting District is comprised of Whitman, Walla Walla, Columbia, Garfield, and Asotin counties. Average production from 1993 through 1997 for this fruit-reporting district was 100 tons. Again, the proposed production area would include all of these counties.

Of the 14 counties that are proposed to be added to the marketing order, 10 currently produce cherries (Franklin, Klickitat, Walla Walla, Spokane, Stevens, Asotin, Lincoln, Kittitas, Adams, and Whitman). Production of cherries is not shown for the counties of Ferry, Pend Oreille, Columbia, and Garfield.

Testimony indicated that it is likely for these current non-producing counties to produce cherries in the future. One grower testified that there are newly planted cherry orchards in Pend Oreille, one of the counties proposed to be in the expanded production area, that currently lists no commercial production. Testimony indicated that these four counties with no current statistics on cherry orchards, could produce cherries in significant volume in the future. The climatic conditions in those counties have potential for future growth. Additional testimony revealed that cattle and wheat farmers in these areas are looking for

alternative crops to enhance their operations and cherries could be a reasonable choice.

As discussed later in this decision, the Committee considered various alternatives and concluded that the proposal it submitted on the expansion of the production area is the most reasonable alternative. The proposed production area is the smallest regional area, which is practicable, while maintaining program effectiveness.

Testimony revealed that Washington cherries have a very positive image to buyers and consumers. When purchases are made of Washington cherries, the buyer does not necessarily know if the cherries originate from counties under the marketing order or not. If one county ships an inferior cherry, the entire state's image could be impacted. Testimony indicated that most of the facilities that pack Washington cherries (both those inside and outside the production area) already pack to the marketing order requirements. However, without modifying the order, a greater possibility exists for more cherries being shipped of an inferior quality.

Testimony further indicated that a grower's success is partly based on the quality of fruit delivered. As production levels continue to increase, the value of maintaining a high quality image will assist growers from encountering decreasing prices. The marketing order assists all growers in that handlers prepare their cherries to a certain quality level, which helps to maintain price levels.

Testimony was received at the hearing on the costs associated with the proposed amendments. The current assessment of 75 cents per ton comprises less than 1 percent of total production costs. The 1999–2000 budget for the Committee is \$62,815, of which \$3,388 is earmarked for compliance efforts. Testimony indicated that increased compliance and administrative costs necessary to monitor this proposal would not be significant.

Testimony further indicated that the annual assessment could even be reduced due to additional cherries being assessed with the expansion of the production area. Testimony at the hearing indicated that the benefits of strengthening the market would outweigh any increase in costs.

Adversely, if the production area is not redefined, testimony indicated that the Washington cherry image could be harmed, as more and more areas are growing cherries. In addition, indications are that a large number of non-bearing acres are coming into production inside and outside the current production area. Adding to the

increase in production are growers of other crops, such as grain and apples, looking for alternative crops to grow in order to supplement incomes. Sweet cherries are an option these growers consider.

Applying grades and standards to the new production areas should provide benefits to producers. The grades and standards allow small producers the opportunity to develop a reputation for producing and delivering a consistent, high quality product. These grades and standards provide incentives and rewards for the production of high quality product. In addition, the establishment of uniform grades and standards across all the production areas provides a level field for competition among both small and large growers. Testimony indicated that as production increases, quality issues become more important. Production is expected to increase in excess of 100,000 tons for the first time in the industry's future.

As an example of the impact inconsistent quality can have on a market, testimony was presented on the Rainier cherry market. Although Rainier cherries are included in the marketing order, they were specifically exempt from quality requirements until a few years ago. Some handlers packed high quality Rainier cherries and received a premium price. When other growers and handlers realized the acceptance of the Rainier, various ranges of quality were shipped in anticipation of receiving a premium price. However, buyers became reluctant to purchase Rainier cherries due to inconsistent quality. The Committee recommended minimum quality requirements for Rainier cherries which were established by regulation under the order. Assurance of consistent quality has resulted in the Rainier cherry market becoming more stable, and Rainiers are again considered a premium product.

The Washington cherry market distinguishes itself from competitors. More product is available from Washington than the other cherry producing States. The Washington cherry market is more diverse and national in scope, and testimony indicated that buyers have confidence in Washington sweet cherries due to consistent quality. Testimony revealed that this distinction is a direct result of the establishment of minimum quality requirements under the marketing order.

Testimony was received from a cooperative cherry handler that represents 108 growers, 27 of which are located in the proposed production area (the balance are in the current production area.) This handler testified

that his company has two packing facilities, one inside the current production area and one in the proposed production area. It was this handler's position that its customers and growers must have confidence in their ability to pack a high quality consistent product.

The witness testified that bringing all his growers under the marketing order would provide better returns for these growers and help bolster the image of the Washington sweet cherry. He stated that implementation of these proposals would level the playing field by eliminating confusion and creating more orderly marketing. This handler would anticipate no significant additional costs as his company already packs all cherries received to the marketing order's minimum quality requirements. It was this handler's position that the benefits would outweigh the costs to cherry growers.

This handler stated that quality issues are foremost to the industry and equate to buyer confidence. Repeat business is critical to the cooperative and any bad perceptions could be detrimental to future business. If all major cherry producing counties were required to maintain the same quality requirements, consistency in quality would prevail. With increasing levels of production in Washington, other U.S. states and in foreign countries, quality becomes more and more important. Consumers view Washington cherries as a premium preferred product and this positive image could suffer if quality is not maintained.

When regulations are in place, all cherries in the production area are required to be inspected and certified as meeting established requirements. Testimony indicated that increased costs associated with more cherries being inspected would be offset by consistent quality and a stable marketplace. Inspection costs are discussed in detail later in this document.

Production has and continues to increase. The increased production is coming from the traditional growing areas in addition to the new production areas. The peak shipping week occurs during the last week of June. With new production and the plantings of late-season varieties of sweet cherries, the marketing window for shipping Washington sweet cherries is expanding into August.

Minimum quality and size standards in the proposed production area would maintain the integrity of the product so that the commodity's overall quality image is not diminished by a low quality sample. The principal objective

of a grading system is to make the market work more efficiently. Minimum quality and size requirements would improve information between buyers and sellers. Contracts could be made based on grade specifications, and buyers need not personally inspect each lot of product. Standardization of quality and size reduces uncertainty between buyers and sellers, and this helps reduce marketing costs. The goal of an effective grading system is to improve quality and size. Minimum quality and size standards would help ensure that substandard product does not find its way to the market and destroy consumer confidence and harm producer returns. Cherries that do not make the specified grade and size requirements can be shipped to processing outlets.

Record evidence supports expanding the production area to include all counties in the State of Washington east of the Cascade Mountain Range.

#### Redefining Districts To Include Expanded Production Area

For purposes of allocating Committee membership, the production area is divided into two geographic districts. If the production area is expanded, it will be necessary to incorporate the additional counties into the districts currently established under the order. The Committee discussed dividing the production area into three districts and distributing the counties and membership across these districts. The Committee was concerned that this would entail increasing Committee membership by more than one handler member as proposed and discussed in Material Issue No. 2. The record indicated that the Committee believed a 16 member Committee would be the most effective. Therefore, it was decided to distribute the new counties proportionately between the two existing districts. District 1 is currently composed of the counties of Chelan, Okanogan, Douglas and Grant. This proposal adds the counties of Lincoln, Spokane, Pend Oreille, Stevens and Ferry. District 2 is currently composed of the counties of Yakima and Benton. This proposal adds the counties of Kittitas, Klickitat, Adams, Franklin, Walla Walla, Whitman, Columbia, Garfield and Asotin.

The proposed District 1 encompasses the northern part of the production area and District 2 encompasses the southern part. In 1997 production in proposed District 1 was approximately 44,300 tons of sweet cherries and in proposed District 2, 45,500 tons. In addition, the tonnage packed in each proposed district is about the same.

Record evidence supports redefining the districts to incorporate the additional counties into the currently established districts in the order.

#### Authority To Deliver Cherries to Packing Facilities Outside the Production Area

The term "handle" under § 923.13 means to sell, consign, deliver, or transport cherries or cause the sale, consignment, delivery, or transportation of cherries in the current of commerce from any point within the production area to any point outside. All cherries "handled" must meet marketing order requirements, but the requirements can be waived for special purpose shipments which are defined in § 923.54 of the order. The Committee has proposed adding as "special purpose shipments" the authority to ship cherries outside the production area for grading or packing.

The Committee has been discussing amending the order for many years. In 1990, the subcommittee appointed to study the expansion of the production area, discussed expanding the production area with producers located outside the production area. Out of these discussions, it was determined that if the production area was expanded, the authority to grade and pack outside the production area was also needed in order to allow many growers in the proposed production area to continue having their cherries packed in Oregon. This would help avoid financial hardships for these growers by maintaining continuity in the packing of their cherries.

A grower/handler from Oregon who does pack Washington cherries testified that some growers who are in the proposed production area have always had their cherries packed at plants outside the production area. His company has operated an orchard at Dallesport, Washington for over 17 years and has always packed the fruit in The Dalles, Oregon. This witness testified that much is invested in his facilities and it would be an economic hardship not to be able to pack and ship his fruit at his own plant. This is a good example of why the proposals for expansion of the production area and shipments outside the production area for packing should be considered as one material issue. This situation applies to many other growers in Dallesport and White Salmon, Washington. Expenses for growers could be dramatically increased if they are required to change their packing facilities to those that are farther from their orchards but in the production area. The four closest packing operations to Dallesport, Washington are in The Dalles, Oregon.

The closest packing facility in Washington to that growing area is in Yakima, which is over 50 miles away.

In addition to proximity to their orchards, there are other reasons growers select certain packing facilities. Many growers select packers based on the quality of pack, the packinghouse image and/or whether or not the packing facility is a cooperative. These options for growers would be limited if they were no longer able to have their cherries packed in Oregon.

There are approximately 75 packing operations in the current production area and two additional packing houses in the proposed production area. There are four packing operations in Oregon that pack Washington cherries for grower/handlers. Testimony indicated that existing packing facilities in the State of Washington could have difficulty handling the volume of Washington cherries if the production continues to increase. The proposal to allow shipments of Washington cherries outside the production area for packing would specifically address this issue. This proposal would provide flexibility in moving product in and out of the marketing order production area while ensuring that quality objectives are not compromised.

WSDA currently has an agreement with the Oregon Department of Agriculture covering the border area between both states, namely in the Bingen, Washington area, where the Oregon Department of Agriculture conducts inspections to Washington standards and marketing order specifications, using appropriate Washington certificates. Testimony indicated this agreement works well, as it assists the industry in supplying quality inspections in that area.

Because of the agreement with the Oregon Department of Agriculture, there is assurance that any Washington product that is inspected by the Oregon Department of Agriculture is inspected to Washington standards or to Washington marketing order requirements. There is documentation that verifies product inspections and this process has proven to be successful in this area. Testimony indicated that the inspection office does not envision any oversight burden imposed by these proposals that it cannot meet.

Safeguard provisions are incorporated into this proposal to ensure compliance with the proposal to authorize shipments outside the production area. This would be done under the special purpose shipment authority contained in § 923.54 of the order. Grower/handlers could deliver cherries to those Oregon packing operations that agree to abide by the marketing order

requirements for such cherries. The Committee would establish additional safeguards to ensure that marketing order requirements are being met. Although no specific procedures have been developed as yet, such information may include a requirement that packing facilities that grade and pack cherries outside the production area apply to the Committee and provide pertinent information necessary to safeguard marketing order provisions. If a packing facility does not abide by applicable requirements, the committee can rescind their agreement and Washington cherries could not be delivered to that facility.

The WSDA assists in monitoring for compliance with the marketing order and would continue to do so. The WSDA provides the Committee with copies of all Federal/State inspection note sheets. If WSDA notifies the Committee of a potential marketing order violation, the Committee takes steps to ensure compliance. Compliance is currently not a problem with the Committee.

The Committee proposal concerning this part of the amendment was designed to address this specific situation involving the packing facilities in Oregon. The proposed order language states that authority for "shipments of cherries for grading and packing to specified locations outside the production area" would be authorized. The specified locations would include the areas where these packing facilities are located in Oregon across the Washington border. This amendment is intended to provide flexibility in addressing the current situation of expanding the production area and to allow packing facilities currently being used to pack Washington cherries to continue to do so.

Record evidence supports authorizing shipments, with appropriate safeguards, outside the production area for packing.

#### Combining Expansion of Production Area, Redefining Districts and Shipments Outside the Production Area as One Issue

Record evidence supports that the proposals to expand the production area, to redefine the districts and to authorize shipments outside the production area for packing be considered as one votable issue in a referendum. Evidence presented at the hearing demonstrated that these proposals are inextricably intertwined and would cause confusion in the referendum if not voted upon as a single issue. The proposal to redefine the districts to allocate the new counties

between the existing districts obviously is only necessary if the production area is expanded. Therefore, this proposal should be combined with the proposal to expand the production area.

Regarding combining the proposals on the production area expansion and the authority to authorize shipments of uninspected cherries outside the production area for packing, these proposals are reliant on each other and should be combined as one issue. Failure for both aspects to pass in referendum could result in hardships for grower/handlers, especially those grower/handlers who currently ship their cherries to Oregon for packing. There are grower/handlers in the proposed production area whose orchards are closer to packing plants in Oregon than in Washington and who currently ship their cherries to these plants for packing.

The record supports these proposed amendments. For the above reasons, the proposal to amend § 923.4 *Production area* by including the counties of Okanogan, Chelan, Kittitas, Yakima, Klickitat in the State of Washington and all of the counties in Washington lying east; the proposal to amend § 923.14 *District* by including the additional counties under Districts 1 and 2; and the proposal to amend § 923.54 *Special purpose shipments* to authorize special purpose shipments, with appropriate safeguards, allowing movement of cherries to packing operations outside the production area should be voted on in the referendum as one material issue.

#### *Material Issue Number 2*

Section 923.20 should be amended to increase representation on the Committee by adding one additional handler member representing District 1. In addition, § 923.20 should be amended to provide equal grower representation in each district.

The current 15-member Committee consists of four grower members representing District 1, six grower members representing District 2, two handler members representing District 1 and three handler members representing District 2. All members have alternates. District 1 includes the counties of Chelan, Okanogan, Douglas, and Grant. District 2 includes the counties of Yakima and Benton. If the proposal to expand the production area is implemented, District 1 would include the counties of Chelan, Okanogan, Douglas, Grant, Lincoln, Spokane, Pend Oreille, Stevens and Ferry. District 2 would include the counties of Kittitas, Yakima, Klickitat, Benton, Adams, Franklin, Walla Walla, Whitman, Columbia, Garfield and Asotin.

The Committee believes that producer representation in District 1 should remain at 4 members and District 2 should remain at 6 members. A witness testified that the amount of tonnage produced is significantly greater in District 2. However, significant quantities of cherries produced in District 2 are packed and graded in District 1. It was estimated that total product packed is nearly equal in both districts. By adding one handler member to District 1, both districts would be equally represented by 3 handler members.

Record evidence supports increasing the membership on the Committee by one handler member. The Washington sweet cherry industry is growing. Bearing acres and production are increasing and markets, including exports, are expanding. Although the Committee's recommendation to increase the number of Committee members by one initially related to the expansion of the production area, the record testimony revealed that the Committee would prefer to have an additional handler member even if the production area is not expanded. Therefore, this material issue is not tied to the expansion of the production area and should be addressed and voted in the referendum on its own merits.

Increasing representation on the Committee would allow additional input in Committee decisions. Having equal handler representation for each district is reasonable considering that the volume handled is similar in each district, whether or not the production area is expanded.

The Committee discussed alternatives to address appropriate representation and districting should the production area be expanded. The Committee agreed that 16 members was an appropriate number for the Committee to be most effective while adequately representing the expanded production area. The alternatives are discussed in more detail later in this document.

Further, an economic report submitted as evidence at the hearing does not support the proponents' statement that the amount of tonnage produced is significantly greater in District 2. The report shows that under the current districts, District 1 has approximately 814 farms growing sweet cherries on approximately 10,000 acres of land. In District 2, approximately 621 farms produce sweet cherries on approximately 9,141 acres of land.

In the proposed districts, District 1 would have approximately 870 farms growing cherries on 10,074 acres. District 2 would have approximately 753 farms that grow cherries on

approximately 11,560 acres of land. Production figures show that in 1997, production in proposed District 1 was approximately 44,300 tons of sweet cherries and in proposed District 2, production was approximately 45,500 tons.

These statistics indicate that volume of production between Districts 1 and 2 is not significantly different in the current and proposed districts. Record evidence revealed that District 2 has slightly less growing acreage currently than District 1 and would have slightly more if the proposal to expand the production area were adopted. Based on record testimony, the Committee is striving for handler representation based on the volume of cherries handled in each district. The record indicated that the Committee intends that grower representation be based on the volume of production for each district. Since statistics show that production in the proposed districts would be relatively the same, grower membership between districts should be equal. Therefore, the record supports modifying the current representation of 4 growers for District 1 and 6 for District 2 to 5 grower members and their respective alternatives per district.

The marketing order provides the authority to redefine the production area districts and to reapportion the representation of any district on the Committee. The Committee may recommend changes in district representation if cherry production within the districts and the production area shifts. These changes can be accomplished through informal rulemaking.

Currently, 12 members are required to make a quorum under the 15-member Committee. Also, 9 concurring votes are currently required to pass any Committee action. A witness testified that quorum and concurring voting requirements were not discussed at meetings when the issue to increase membership was discussed. However, the current quorum and voting numbers would still be considered a "super" majority should the membership on the Committee increase by one handler member. The witness indicated that the current requirements would be adequate and no changes are being recommended to the quorum and voting requirements.

Seemingly, record evidence suggests increasing representation on the Committee by one handler member and providing for equal grower representation in each district.

#### *Material Issue Number 3*

Section 923.41 should be amended to add authority to require handlers to pay

late payment charges and/or interest on late assessment payments in order to encourage timely remittance of assessments by handlers.

Currently, § 923.41 requires handlers to pay to the Committee on demand assessments on cherries received by the handler. There is no provision for a late payment or interest charge.

Record testimony revealed that most handlers pay assessments promptly and timely. However, the Committee's operating budget is relatively small and late payments could be detrimental to the operations of the Committee. Three marketing orders are administered by one manager and share expenses in order to mitigate costs. The other marketing orders are the Washington Apricot marketing order (Marketing Order No. 922) and the Washington-Oregon Fresh Prune marketing order (Marketing Order No. 924). Assessments collected under the sweet cherry order represent 80 percent of the combined budgets. For example, the 1999–2000 total annual budget for sweet cherries is \$62,815, while the two other program budgets combined total \$18,600. Testimony indicated that even a few hundred dollars in late assessments could be detrimental to the administration of the cherry program.

Testimony further indicated that failure to incorporate a charge for late payment of assessments would not be equitable for handlers who pay on time. These handlers would be financing Committee operations while late paying handlers would benefit from the Committee programs.

Late payment and interest charges for delinquent assessments would provide an incentive for handlers to pay on time. This would result in fewer funds needed by the Committee for collection activities. Also, the fees derived from late payment and interest charges would partially compensate the Committee for its collection efforts.

The Committee envisions implementing the specifics of the late payment and/or interest charges through informal rulemaking with the Secretary's approval. This would allow the Committee to remain flexible with the establishment of the interest and late payment charge. The Committee anticipates that the billing statements would include a date at which time a late payment charge of a specified amount would be assessed. The statement would advise the handler that in addition to the late payment charge, an interest payment of a certain percent on the unpaid balance would be assessed each month thereafter. Testimony indicated that an example of such charges would be similar to what

commercial businesses charge, such as a \$25 late fee, and a one and a half percent per month charge on the unpaid balance.

The Department agrees that authorizing late payment and interest charges would encourage prompt payment and thereby, help ensure that the Committee operates effectively. The annual sweet cherry budget is small enough that even a few handlers paying late could disrupt Committee operations.

Accordingly, record evidence supports this aspect of the proposal. However, in the proposed amendatory language, a provision was included stating "the Committee may also recommend other methods of assessment collection with the approval of the Secretary." Testimony revealed that other methods of assessment collection would be filing liens against handlers for failure to pay assessments or suing a handler in small claims court for unpaid assessments.

There is no authority under the Act allowing the Committee to file liens or sue in small claims court for unpaid assessments. Therefore, this provision should not be included in the proposed amendment.

#### Material Issue Number 4

Section 923.52 should be amended to authorize the Committee to establish container marking requirements.

Currently, the order provides the authority to fix the size, capacity, weight, dimensions, or pack of containers that may be used to ship fresh sweet cherries. The order does not include authority to establish marking requirements.

Testimony indicated that, in the cherry industry, the customer dictates specifications of products such as quality, packaging and variety. The quality, size, container and pack requirements currently authorized under the order address many of these preferences. These provisions are used by the Committee and modified with industry changes and customer preferences. They help to maintain a positive image for Washington sweet cherries and stimulate repeat business. The proposal to add the authority to implement marking requirements would add an additional marketing tool for the Committee to continue meeting customer needs.

Washington sweet cherry bearing acres are continually increasing, which has resulted in increased production. Since 1959, the production of sweet cherries has increased by over 500 percent. Production levels are trending toward 100,000 tons in the near future.

New national markets have developed and exports now play an important role in the marketing of sweet cherries. Exports represented 40 percent of fresh sweet cherry shipments in 1998. In 1998, exports increased 35 percent over the 1997 levels, achieving a new high of 28,560 tons.

Testimony revealed that two containers are primarily used in packing sweet cherries currently. However, in response to customer preferences, the industry is moving to multiple packaging and multiple varieties of cherries. As packaging and varieties become more diverse and production continues to increase, container markings are becoming increasingly important.

In addition, product identification and origination becomes increasingly important as more and more sweet cherries are shipped greater distances nationally and to foreign markets. Testimony indicated that many handlers currently mark their containers to meet customer needs. However, uniform marking requirements would eliminate confusion and ensure to customers that they are receiving the products ordered. Testimony indicated that marking requirements that may be recommended by the Committee are weights, growing areas and State of origin.

For these reasons, the Committee believes that it is becoming more important to denote product origination and varieties on packaging. Testimony indicated that containers may need to be marked more precisely in the future than just stating "sweet cherries." Uniform marking requirements would provide additional consistency in product identification. This proposal is intended to provide that authority.

The proponents have recommended establishing the authority for marking requirements under the marketing order. However, implementation of any specific regulations would require a recommendation by the Committee for informal rulemaking. The Committee wants to keep the order language flexible enough so that the Committee could adapt and modify marking requirements with changing needs and preferences of customers.

Testimony indicated that no significant costs would be incurred if this authority were implemented because handlers already have the equipment to mark containers. Container markings are currently accomplished by handlers on an individual basis. The benefits of this proposed amendment would be in the form of uniform marking requirements for Washington sweet cherries.

Although the Committee has not developed a specific type of marking that would be recommended, adding the authority to establish marking requirements in the future is reasonable. The authority for uniform container marking requirements would further expand and complement the current container and pack requirements already being used. The Committee would discuss any recommended markings at meetings and vote on support for a marking requirement. Therefore, record evidence supports adding authority for container marking requirements to § 923.52.

#### *Material Issue Number 5*

Section 923.25 should be amended to authorize Committee nominees to qualify as a member or alternate by filing a written acceptance of willingness to serve prior to the selection.

The Committee consists of 15 members, each of whom has an alternate. Ten members are growers and five are handlers. The term of office for Committee members and alternates is two years, beginning on April 1 and ending on March 31. Members and alternates serve in such capacities for the term of office for which they were selected and qualified until their respective successors are selected and have qualified.

Currently, Committee nominations are made at the designated meetings where elections are to be held. These meetings are required to be held no later than March 1 of each year. Elected nominees for member and alternate positions are required to furnish a background statement, which is forwarded to the Secretary along with a list of nominees. After being notified of the selection by the Secretary, the members and alternates sign a written acceptance indicating their willingness to serve on the Committee.

The proposal would delete the requirement that the selected member/alternate file a written acceptance after notification of selection and combine the acceptance letter with the background statement submitted prior to the selection. The nominee would, in effect, be indicating willingness to serve on the Committee prior to being selected.

Committee Form FV-23 is the Background Statement form. This form allows the Committee and Secretary to determine a nominee's eligibility to serve on the Committee by requiring information on the nominees' experience in the sweet cherry industry. The time required to complete this form is estimated to be five minutes. When

nominated, the nominee completes this form. If the nominees do not return these forms promptly, delays can occur in submitting the nominee's names to the Secretary for selection, which could have a negative impact on the seating of the Committee.

The Acceptance Letter, currently signed after selection, merely requires a signature from the person accepting the appointment. Testimony indicated that there is no advantage to waiting for this form to be signed by the selectee.

The Committee believes that combining these forms as one and requiring submission at the time of nomination would be more efficient than the current method. Testimony indicated that the nominee, in effect, indicates willingness to serve on the Committee by accepting the nomination and completing the background statement upon nomination. By combining these forms into one and requiring the information at the time of nomination, the Committee and Secretary know in advance that the nominees are willing to serve on the Committee if selected.

Testimony indicated that there is no benefit in waiting for the nominee to sign the Acceptance Letter after being selected. No negative impacts are anticipated from implementing this proposal. However, the benefits are that the nominees are only required to sign and deliver one form. In addition, the Committee could obtain all pertinent information well ahead of the time for seating of the new Committee, thereby operating more efficiently.

The Department will submit the modified form to the Office of Management and Budget (OMB) for approval. Current information collection requirements for Part 923 are approved by OMB under OMB number 0581-0133.

Accordingly, record evidence supports revising § 923.25 of the order.

#### *Material Issue Number 6*

Section 923.21 should be revised to establish a limit on the number of consecutive terms a person may serve on the Committee. Currently, the term of office of each member and alternate member of the Committee is two years. There are no provisions related to tenure in the marketing order. Members and alternates may serve on the Committee until their respective successors are selected and have qualified.

The Department believes that all marketing order programs should consider tenure requirements for committee membership as a part of any amended order process. The Department

believes that this provision would increase industry participation on the Committee, provide for more diverse membership, provide the Committee with new perspectives and ideas, and increase the number of individuals in the industry with Committee experience.

Experience with other marketing order programs suggests that a period of six years would be appropriate. Since the current term of office for members and alternates is two years, the Department is proposing that no member serve more than three consecutive two-year terms or a total of six years. This proposal for a limitation on tenure would not apply to alternates. Once a member has served on the Committee for three consecutive terms, or six years, the member would sit out for one year before being eligible to serve as a member again. The member could serve as an alternate during that time.

Witnesses presented testimony in opposition to this proposal. Although the Committee agrees with the principal that outreach efforts are important, the application of tenure could be problematic. Testimony indicated that the sweet cherry producing area is rather small in comparison to other fruit and vegetable growing areas, and finding growers willing to serve on the Committee is difficult. In addition, testimony further indicated that it is counterproductive to require valuable members to step down when the current system is working well.

Regarding diversity, testimony indicated that there are few diverse individuals in the cherry industry and limiting tenure on the Committee would make it challenging to maintain a diverse Committee membership and to meet the Department's diversity goals. The Committee has difficulty getting growers involved in Committee operations. Many growers participate in the nomination meetings, but few volunteer to participate as members or alternates. The Committee finds that the industry members that do agree to serve bring knowledge and experience to the Committee that would be difficult to replace.

Testimony indicated that the Committee would continue outreach efforts to encourage diverse representation on the Committee. If the proposal is implemented, the Committee supports that tenure should not apply to alternates.

The Department believes, and experience with other marketing order committees has demonstrated, that tenure requirements for committee membership increases participation,

provides for more diverse committees, provides for different perspectives, and increases the number of industry members with Committee experience.

Therefore, record evidence supports establishing tenure requirements for the Committee.

#### *Material Issue Number 7*

Section 923.64 should be amended to require that continuance referenda be conducted every six years to ascertain industry support for the order.

Currently, there is no provision in the marketing order that provides for periodic continuance referenda.

The Department believes that producers should have an opportunity to periodically vote on whether a marketing order should continue. Continuance referenda provide an industry with a means to measure producer support for the marketing order program. Experience has shown that programs need significant industry support to operate effectively. Under this proposal, the Department would consider termination of the marketing order if less than two-thirds of those voting and less than two-thirds of the volume represented in the referendum favored continuance. This is the same as that for issuance of an order. As with tenure, experience in recent years indicates that six years is an appropriate period to allow producers an opportunity to vote for continuance of the program. Therefore, the proposal sets forth that a referendum would be conducted six years after the effective date of this amendment and every sixth year thereafter.

Witnesses presented testimony in opposition to this proposal. Testimony indicated that the industry currently has the ability to request a continuance referendum at any time. The Committee believes that requiring unnecessary referenda is costly and of little value to the industry or the Department. The program has worked successfully since 1957 and growers have not been against any major aspects of the order since that time.

Testimony also indicated that requiring a continuance referendum every six years would further impede participation on the Committee. Based on record evidence, many industry members believed that the process for conducting continuance referenda is similar to the marketing order amendment process, in that a hearing would be required.

Contrary to formal amendment proceedings, continuance referenda do not require a hearing. Most referenda are conducted by mail. All growers in the production area would be sent a ballot

and would be asked, not required, to answer whether they support continuance of the marketing order. The growers then send the ballot back to the Department. That is the extent of grower responsibility in the continuance referenda process. The Department prepares the ballot, mails the ballots and tallies and publishes the results. The Committee office does assist the Department in this process by providing a list of growers eligible to vote in the referendum.

The Department believes that producers should have an opportunity to periodically vote on whether the marketing order should continue.

Accordingly, the record evidence supports adding a requirement that such referenda be conducted.

The Agricultural Marketing Service also proposed to make such changes as may be necessary to the order to conform with any amendment that may result from the hearing. The Department has identified no necessary conforming changes.

#### **Small Business Considerations**

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), the AMS has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions so that small businesses will not be unduly or disproportionately burdened. Small agricultural producers have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$500,000. Small agricultural service firms, which include handlers regulated under the order, are defined as those with annual receipts of less than \$5,000,000.

Interested persons were invited to present evidence at the hearing on the probable regulatory and informational impact of the proposed amendments on small businesses. The record indicates that growers and handlers would not be burdened by any additional regulatory requirements, including those pertaining to reporting and recordkeeping as a result of these proposed amendments.

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.

The record indicates that there are approximately 75 handlers currently

regulated under Marketing Order No. 923. There are two additional packing houses in the proposed production area that would be considered handlers if the production area is expanded. There are four packing operations in Oregon that pack Washington cherries for grower/handlers. In addition, there are approximately 1,400 cherry growers in the current production area. There would be approximately 200 additional growers if the production area is expanded as proposed.

In 1998, Washington produced 96,000 tons of sweet cherries. The average price for fresh cherries in 1998 was \$1,600 per ton. This computes to approximate revenues for the 1998 crop of \$153,600,000. The record indicated that approximately 15 handlers handle the majority of the crop and could be classified as large businesses. Thus, a majority of sweet cherry handlers could be classified as small entities. The same is estimated with regard to the packing houses in Oregon.

Dividing total production from 1998 by the number of growers in the proposed production area, the average grower produces about 60 tons of cherries annually. With an average price of \$1,600 per ton for 1998 sweet cherries, average revenues would be \$96,000. Thus, it is reasonable to conclude that most sweet cherry growers are small entities.

#### **Industry Background**

Sweet cherries rank second to apples as the most important fruit grown in Washington, with a value of production of \$128.7 million. Washington growers produced 96,000 tons of sweet cherries in 1998, which is 46 percent of the nation's total.

The varieties of sweet cherries subject to regulation under the order are: Bing, Chelan, Lambert, Lapin, Rainier, and Sweetheart. Shipping of these cherries generally begins around June 15 and usually ends around August 15. The most active harvest period is from June 10 through July 20.

The order authorizes the use of grade, size and container regulations for the fresh shipment of sweet cherries from the production area. The regulations, specify certain size, maturity and pack requirements. The current regulations are based on Washington grade standards and apply to specific varieties. The purpose of these regulations is to ensure the shipment of high quality cherries. The order has allowed the industry to develop the reputation for shipping a quality product, which has allowed producers to ship and sell fruit in a more stable marketplace.

Washington is the leading producer of sweet cherries for fresh market sale. Washington's main competitors in domestic fresh markets are California and Oregon. From 1994 through 1998, Washington produced an average of 55,600 tons per year. This represents 59 percent of the total sweet cherries marketed fresh. California produced an average of 20,460 tons per year and Oregon produced 12,900 tons per year from 1994 through 1998.

Sweet cherries are also grown in Idaho, Montana and Utah, as well as Michigan, New York and Pennsylvania. Bearing acreage figures are not published for the States of Idaho and Montana. Utah's production area totals 600 acres, and has been declining. Bearing acreage figures are published for Michigan, New York and Pennsylvania, but the majority of sweet cherries grown in those states are not sold in fresh markets. The fruit in these States are produced and marketed during the summer months each year. While these States compete with Washington, Oregon and California in the marketing of fresh sweet cherries, their production is relatively small.

From 1964 through 1998, total U.S. production of sweet cherries increased 332 percent and fresh utilization increased 393 percent. This suggests that fresh shipments have been growing in importance, while the processing sector has remained relatively stable. Over the past five seasons, 66 percent of Washington's production moved into fresh markets.

Over the last 30 years, prices between the three primary growing States have been very competitive. Prices in California, Washington and Oregon have averaged \$1,166, \$1,028 and \$798 per ton, respectively. California prices are slightly higher than prices in Washington or Oregon. One of the reasons that California prices average higher than Washington's is that California shipments begin in the early part of May, when competition in the fresh fruit market is limited. Washington shipments do not start until the middle of June. Early-season shippers generally receive a premium for their product on the fresh market.

Fresh prices for Washington sweet cherries receive a premium over processing sweet cherries. From 1969 to 1998, fresh prices have increased more than 350 percent. Fresh cherry prices were \$350 per ton in 1969 and were as high as \$2,150 per ton in 1996. Prices were \$1,600 per ton in 1998.

While California growers receive higher prices than Washington growers on average, Washington's value of production is much greater than

California's or Oregon's. This is due to higher yields and larger production levels in Washington. This likely indicates that Washington growers have a comparative cost advantage over California or Oregon growers. In 1998, Washington reported its highest value of fresh production, \$113.6 million. This compares to a 1998 value of fresh production of \$17.9 million for California and \$22.6 million for Oregon. The value of fresh production has increased more than 150 percent since 1991.

Exports play an important role in the marketing of Washington sweet cherries. With increasing bearing acres and production levels trending toward 100,000 tons in the near future, increasing levels of exports can be anticipated. However, competition in the export markets is expected to be high. California continues to export a large volume of their increasing production. In addition, China is estimated to have 25,000 acres of cherries planted. Spain, Greece, Turkey, Iran, Lebanon, Syria and some Eastern European countries have also increased production levels. These countries do not import sweet cherries into the U.S.

Exports of fresh Washington sweet cherries have been increasing, in particular during the 1997 and 1998 seasons. Exports reached a high of 21,148 tons in 1997. In 1998, exports increased 35 percent over the 1997 levels, achieving a new high of 28,560 tons.

Export markets demand a high quality product. With a limited shelf life, these fresh deliveries of sweet cherries require a high quality product. The shipment of low quality product could ruin years of market development in an export market. Grades and standards assure the shipment of high quality fruit into export markets, and small growers as well as large growers will benefit.

#### **Production Area and Shipments Outside Production Area**

When the marketing order was created in 1957, sweet cherries were primarily grown in only 6 counties in the State of Washington. The 6 counties that are currently regulated are Okanogan, Chelan, Douglas, Grant, Benton, and Yakima. The 14 additional counties proposed for inclusion are Kittitas, Klickitat, Ferry, Stevens, Pend Oreille, Lincoln, Spokane, Adams, Whitman, Franklin, Walla Walla, Columbia, Garfield, and Asotin.

Cherry production has dramatically increased in areas within the State of Washington that are outside the current production area. As more land has come into irrigation and farmers look for

alternative crops to grow, sweet cherry production is expected to increase in areas outside the current production area.

The proposed amendment to increase the production area to cover the area in the State of Washington east of the Cascade Mountain Range, to redefine the districts in order to include the additional counties and to authorize special purpose shipments, with appropriate safeguards, allowing movement of cherries to packing operations outside the production area would improve the effectiveness of the marketing order by ensuring that the major cherry producing counties in Washington are covered under the marketing order. In addition, including counties with potential to produce significant amounts of sweet cherries would ensure that all major production would be covered under the marketing order in the future. The proposed amendment would also benefit growers, especially growers not currently regulated under the order, by allowing many of these growers to continue shipping their cherries to Oregon for packing.

The Committee has been discussing amending the order in this regard for many years. In 1990, a subcommittee composed of small and large growers and handlers was appointed to study the expansion of the production area. The Committee discussed expanding the production area with producers located outside the production area. Out of these discussions, it was determined that if the production area was expanded, the authority to grade and pack cherries outside the production area was also needed in order to allow growers in the proposed production area to avoid financial hardships by maintaining continuity in the packing of their cherries.

In March 1998, the Committee recommended numerous amendments to the marketing order, including covering the entire State of Washington in the production area. In August 1999, the Committee recommended modifying the recommendation on the production area proposal from regulating the entire State to only including the eastern part of the State.

Alternatives to the current proposal on the expansion of the production area were considered by the Committee. These alternatives were: (1) Including the entire State of Washington; (2) including the States of Washington and Oregon; and (3) including the States of Washington, Oregon, Idaho and Utah. Committee representatives communicated with growers and handlers in these regions. Public

meetings on the subject were publicized in these growing areas and interested parties were encouraged to attend. Committee members also attended grower meetings in these areas to discuss expansion of the production area.

Regarding including the entire State of Washington, the Committee determined that due to weather conditions, it would be unlikely that cherries could be commercially produced in significant amounts west of the Cascade Mountain Range in Washington. Average production in this area is 50 tons per year. Testimony indicated that excessive rain causes serious quality problems with sweet cherries, such as cracking. Generally, weather conditions in eastern Washington are more favorable for growing sweet cherries, as well as other horticultural crops.

Representatives from Idaho and Utah believed that their production and marketing could be easily distinguished and segregated from Washington and Oregon production. In addition, it was believed the Idaho and Utah sweet cherry industry was not large enough to make an impact on Washington cherries. Statistical data presented at the hearing on the volume of cherries produced in Idaho and Utah supports this belief.

Oregon's sweet cherry industry primarily borders the State of Washington, but representatives from Oregon believed their industry should be kept separate from the Washington industry. The record evidence revealed that Oregon already has two organizations that represent the interests of sweet cherry growers, the Oregon Sweet Cherry Commission and the Wasco County Fruit and Produce League. These organizations collect assessments based on cherry production. According to record testimony, the Oregon growers did not see the need to form another organization to protect their interests. In addition, testimony indicated that Oregon growers did not want to become a minor part of the Washington order.

An organization called the Northwest Cherry Growers also represents the States of Washington, Oregon, Idaho and Utah. This group is responsible for collecting assessments based on cherry tonnage and directing promotion programs for sweet cherries grown in these four states.

Based on record evidence, the Committee considered these various alternatives and concluded that the proposal it submitted on the expansion of the production area is the most reasonable alternative. The proposed

production area is the smallest regional area, which is practicable, while maintaining program effectiveness.

The record revealed that the average cherry farm size in Washington ranges from 3 or 4 acres to several hundred acres. The average farm is approximately 40 acres. According to testimony, there are approximately 180 growers in the proposed production area that are larger than the average farm. Some farms in the proposed production area, particularly in Franklin County, are 50 to 200 acres. Although much of this acreage is currently non-producing, testimony indicated that the potential exists for significant production. Unlike the western part of the State where significant production is not anticipated, if those areas with significant production potential are not regulated, it could have a detrimental impact on the favorable Washington sweet cherry quality image.

Testimony was received at the hearing on the costs associated with the proposed amendments. This testimony indicated that costs associated with this proposal would be minor. The total annual cost of production for a mature orchard is \$7,413.06 per acre. The current assessment of 75 cents per ton comprises less than 1 percent of total production costs. Any increase in assessments resulting from this proposed amendment would not have a significant negative financial impact on growers or handlers. Testimony indicated that the annual assessment could even be reduced due to additional cherries being assessed with the expansion of the production area.

Applying grades and standards to the new production areas should provide benefits to small producers. The grades and standards allow small producers the opportunity to develop a reputation for producing and delivering a consistent, high quality product. These grades and standards provide incentives and rewards for the production of high quality product. In addition, the establishment of uniform grades and standards across all the production areas provides a level field for competition among both small and large growers. Testimony indicated that as production increases, quality issues become more important and production is expected to increase in excess of 100,000 tons for the first time in the industry's history.

The 1999-2000 budget for the Committee is \$62,815, of which \$3,388 is earmarked for compliance efforts. Testimony indicated that increased compliance and administrative costs necessary to monitor this proposal would not be significant. It was testified

that the benefits of strengthening the market would outweigh any increase in costs. Adversely, if the production area is not redefined, testimony indicated that the Washington cherry image could be harmed, as more and more areas are growing cherries. In addition, indications are that a large number of non-bearing acres are coming into production inside and outside the current production area. Adding to the increase in production are growers of other crops, such as grain and apples, looking for alternative crops to grow in order to supplement incomes. Sweet cherries are an option these growers consider.

The Washington cherry market distinguishes itself from competitors. More product is available from Washington than the other cherry producing States. The Washington cherry market is more diverse and national in scope, and testimony indicated that buyers have confidence in Washington sweet cherries due to consistent quality. Testimony revealed that this distinction is a direct result of the establishment of minimum quality requirements under the marketing order. If the proposal to allow cherry shipments outside the production area for packing is implemented there are safeguards in place to ensure that minimum quality requirements are met. If these facilities fail to abide by the applicable requirements, the committee can rescind their privileges and Washington cherries could not be delivered to that facility.

When regulations are in place, all cherries in the production area are required to be inspected and certified as meeting established requirements. The Washington State Department of Agriculture's Fruit and Vegetable Inspection Program (WSDA), headquartered in Olympia, Washington collaborates with USDA-AMS, Fresh Products Branch to provide inspection to marketing order commodities in Washington. WSDA's district offices are located in Yakima, Wenatchee and Moses Lake. These main district offices have area offices in strategic locations to the various growing areas in the State. WSDA employs approximately 150-160 full-time inspection staff throughout the State. In addition, during peak harvest periods, temporary inspectors are hired.

The WSDA operates on a user-fee basis; no appropriated funds are received. Inspection fees pay for the program to operate. Except for random inspections conducted on fruit stands to comply with a cherry fruit fly quarantine program, WSDA provides inspections only upon request. The applicant indicates to WSDA what type

of inspection is needed, such as compliance with a marketing order.

The fees for cherry inspections are 21 cents per hundred weight or \$23/hour, whichever is greater, plus additional charges for travel time and mileage. The larger growers have individual inspectors stationed at their warehouses during the season. The time and mileage charges are more frequently assessed to the smaller grower/packer because of the small volumes inspected and remote locations. However, WSDA attempts to mitigate costs, especially to small growers and handlers. WSDA helps smaller growers mitigate these costs by meeting growers halfway between their orchard and the inspection office or WSDA authorizes the grower to bring the product to the inspection office.

Individual shipments not exceeding 100 pounds in the aggregate are exempt from the regulations, as well as cherries for home use and cherries not intended for re-sale. In addition, shipments for consumption by charitable institutions, for distribution by relief agencies or for commercial processing into products are exempt from regulation.

Testimony indicated that increased costs associated with more cherries being inspected in accordance with marketing order requirements would be offset by consistent quality and a stable market place. In addition, most handlers already pack their cherries and have them inspected in accordance with marketing order requirements, regardless of whether the cherries are grown inside or outside the current production area.

Minimum quality and size standards in the proposed production area would maintain the integrity of the product so that the commodity's overall quality image is not diminished by a low quality sample. The principle objective of a grading system is to make the market work more efficiently. Minimum quality and size requirements would improve information between buyers and sellers. Contracts could be made based on grade specifications, and buyers need not personally inspect each lot of product. Standardization of quality and size reduces uncertainty between buyers and sellers, and this helps reduce marketing costs. The goal of an effective grading system is to improve quality and size. Minimum quality and size standards would help ensure that substandard produce does not find its way to the market and destroy consumer confidence and harm producer returns. Cherries that do not meet the grade and size requirements can be sold in the processed market.

In addition to proximity to their orchards, there are other reasons

growers select certain packinghouses. Many growers select handlers based on the quality of pack, the packinghouse image and/or whether or not the handler is a cooperative. These options for growers would be limited if they were no longer able to have their cherries packed in Oregon.

Testimony indicated that existing packing facilities in the State of Washington could have difficulty handling the volume of Washington cherries if the production continues to increase. The proposal to allow shipments of Washington cherries outside the production area for packing would specifically address this issue. This proposal would provide flexibility in moving product in and out of the marketing order production area.

WSDA currently has an agreement with the Oregon Department of Agriculture covering the border area between both states, namely in the Bingen, Washington area, where Oregon Department of Agriculture conducts the inspections to Washington standards and marketing order specifications. Testimony indicated this agreement works well, as it assists the WSDA in supplying quality inspections in that area. Testimony indicated that the inspection office does not envision any oversight burden imposed by these proposals that it cannot meet. Safeguard provisions are incorporated into this proposal to ensure compliance with the proposal to authorize shipments outside the production area.

If the production area is expanded, it would be necessary to incorporate the additional counties regulated into the districts currently established under the order. The Committee discussed dividing the production area into three districts and distributing the counties and membership across these districts. The Committee was concerned that this would entail increasing Committee membership by more than one handler member as proposed and discussed in Material Issue No. 2. The record indicated that the Committee believed a 16 member Committee would be the most effective. Therefore, it was decided to distribute the counties proportionately among the two districts.

The proposed District 1 encompasses the northern part of the production area and District 2 encompasses the southern part. In 1997 production in proposed District 1 was approximately 44,300 tons of sweet cherries and in proposed District 2, 45,500 tons. In addition, tons packed in each proposed district is close to equal. This distribution of counties among the two districts would provide for equal representation of handlers and growers from each district.

## Committee Representation

The proposed amendment to increase representation on the Committee by adding one additional handler member would improve representation on the Committee and allow the Committee to function more efficiently.

Record evidence supports increasing the membership on the Committee by one handler member. The Washington sweet cherry industry is growing. Bearing acres and production are increasing and markets, including exports, are expanding. Although the Committee's recommendation to increase the number of Committee members by one initially related to the expansion of the production area, the record testimony revealed that the Committee would prefer to have an additional handler member even if the production area is not expanded.

Increasing representation on the Committee would allow additional input in Committee decisions. Having equal handler representation for each district is reasonable considering that the volume handled is similar in each district, regardless if the production area is expanded. Costs of adding an additional member to the Committee would be minimal.

In its deliberations, the Committee discussed alternatives to address appropriate representation and districting should the production area be expanded. One alternative was to divide the area into three districts and distribute membership proportionately across these districts. This alternative would have likely entailed increasing membership by more than one. The Committee was concerned that increasing the number of members by more than one would hinder the decision-making capability of the Committee. The Committee agreed that 16 members was an appropriate number for the Committee to be most effective while adequately representing the expanded production area.

## Late Payment and Interest Charges on Delinquent Assessments

The proposed amendment to authorize the Committee, with AMS approval, to collect late payment and interest charges on delinquent assessments would encourage handlers to pay their assessments on time. Assessments not paid promptly add an undue burden on the Committee because the Committee has ongoing projects and programs funded by assessments that are functioning throughout the year. The addition of such a charge is consistent with standard business practices. No costs

would be associated for handlers who pay timely assessments.

Late payment and interest charges for delinquent assessments would provide an incentive for handlers to pay on time. This would result in fewer funds needed by the Committee for collection activities. Also, the fees derived from late payment and interest charges would partially compensate the Committee for its collection efforts.

#### Container Marking Requirements

The proposed amendment to authorize the Committee, with AMS approval, to establish container marking requirements would further expand and enhance the current container and pack requirements already being used. Uniform marking requirements would assist in avoiding confusion in the marketplace.

Testimony indicated that no significant costs would be incurred if this authority were implemented because handlers already have the equipment to mark containers. Container markings are currently accomplished by handlers, on an individual basis. The benefits of this proposed amendment would be in the form of uniform marking requirements for Washington sweet cherries.

#### Combining Forms Required by Committee Nominees

The proposed amendment to authorize Committee nominees to qualify as a member or alternate by filing a written acceptance of willingness to serve prior to the selection would allow the selection process to take place in a more timely fashion.

The proposal would delete the requirement that the selected member/alternate file a written acceptance after notification of selection and combine the acceptance letter with the background statement submitted prior to selection. The nominee would, in effect, be indicating willingness to serve on the Committee prior to being selected.

Testimony indicated that there is no benefit in waiting for the nominee to sign the acceptance letter after being selected. No negative impacts are anticipated from implementing this proposal. However, the benefits are that the nominees are only required to sign and deliver one form. In addition, the Committee could obtain all pertinent information well ahead of the time for seating of the new Committee, thereby operating more efficiently.

#### Committee Tenure Requirements

The proposed amendment to add tenure requirements for Committee members would allow more persons the opportunity to serve as members on the Committee. It would provide for more diverse membership, provide the Committee with new perspectives and ideas, and increase the number of individuals in the industry with Committee experience. It is anticipated that this proposed amendment would not increase costs to small businesses.

#### Continuance Referenda

The proposed amendment to require that continuance referenda be conducted on a periodic basis to ascertain industry support for the order would allow growers the opportunity to vote on whether to continue the operation of the marketing order. Although this proposed amendment may generate minimal Committee costs to assist in conducting the referenda, there are no additional costs anticipated for small businesses.

#### Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 35), the reporting and recordkeeping provisions that would be generated by the proposed amendments would be submitted to the Office of Management and Budget (OMB). Specifically, if the production area is expanded, the overall burden of completion of all Committee generated forms and reports could increase due to additional handlers being regulated, as well as additional growers in the regulated area. Current total burden hours are approximately 69 hours and only relate to referenda and nominations. Sixty eight of these hours relate to producer referenda. The other hour covers time spent by Committee members and alternates completing membership forms. Adding an additional 200 growers would increase the overall burden for referenda documentation by approximately one hour. Adding an additional handler member would increase the overall burden to complete nomination forms from 1.25 hours to 1.33 hours. The documentation required to implement the safeguard provisions for the four packing facilities in Oregon are yet to be established, but it is not anticipated that the overall burden would be dramatically increased. It is anticipated an application form would be developed for these packing operations. These provisions and any additional provisions modifying reporting and recordkeeping burdens that generate from these proposed amendments

would not be effective until receiving OMB approval. Current information collection requirements for Part 923 are approved by OMB under OMB number 0581-0133. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

The Department has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule. All of these amendments are designed to enhance the administration and functioning of the marketing order to the benefit of the industry.

While the implementation of these requirements may impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of these costs may be passed on to growers. However, these costs would be offset by the benefits derived by the operation of the marketing order. In addition, the meetings regarding these proposals as well as the hearing date were widely publicized throughout the Washington sweet cherry production area and proposed production area and all interested persons were invited to attend the meetings and the hearing and participate in Committee deliberations on all issues. All Committee meetings and the hearing were public forums and all entities, both large and small, were able to express views on these issues. The Committee itself is composed of 15 members, of whom five are handlers and ten are producers. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at the following web site: <http://www.ams.usda.gov/fv/moab.html>. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 30-day comment period is provided to allow interested persons to respond to this proposal. Thirty days is deemed appropriate so that this rulemaking may be completed prior to the 2001 season which begins April 1, 2001. All written exceptions timely received will be considered and a grower referendum will be conducted before these proposals are implemented.

## Civil Justice Reform

The amendments proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. If adopted, the proposed amendments will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with the amendments.

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 request 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 date of the entry of the ruling.

## General Findings

The findings hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of the marketing agreement and order; and all 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.

(1) The marketing agreement and order, as hereby proposed to be amended, 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 to be amended, regulate the handling of sweet 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 a hearing has been held;

(3) The marketing agreement and order, as hereby proposed to be amended, 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; and

(4) All handling of sweet cherries grown in the production area as defined in the marketing agreement and order, as hereby proposed to be amended, is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

## List of Subjects in 7 CFR Part 923

Marketing agreements, Cherries, Reporting and recordkeeping requirements.

## Recommended Amendment of the Marketing Agreement and Order

For the reasons set out in the preamble, 7 CFR part 923 is proposed to be amended as follows:

### PART 923—SWEET CHERRIES GROWN IN DESIGNATED COUNTIES IN WASHINGTON

1. The authority citation for 7 CFR part 923 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

2. Revise § 923.4 to read as follows:

#### § 923.4 Production area.

*Production area* means the counties of Okanogan, Chelan, Kittitas, Yakima, Klickitat in the State of Washington and all of the counties in Washington lying east thereof.

3. Amend § 923.14 by revising paragraphs (a) and (b) to read as follows:

#### § 923.14 District.

\* \* \* \* \*

(a) *District 1* shall include the Counties of Chelan, Okanogan, Douglas, Grant, Lincoln, Spokane, Pend Oreille, Stevens, and Ferry.

(b) *District 2* shall include the counties of Kittitas, Yakima, Klickitat, Benton, Adams, Franklin, Walla Walla, Whitman, Columbia, Garfield and Asotin.

#### § 923.20 [Amended]

4. Amend § 923.20 as follows:

a. In the first sentence remove the word "fifteen" and add the word "sixteen" in its place;

b. In the third and fourth sentences remove the word "five" and add the word "six" in its place;

c. In the fifth sentence, remove the words "four" and "six" and add the word "five" in their place; and

d. In the sixth sentence, remove the word "two" and add the word "three" in its place.

5. Revise § 923.21 to read as follows:

## § 923.21 Term of office.

The term of office of each member and alternate member of the committee shall be for two years beginning April 1 and ending March 31. Members and alternate members shall serve in such capacities for the portion of the term of office for which they are selected and have qualified and until their respective successors are selected and have qualified. Committee members shall not serve more than three consecutive terms. Members who have served for three consecutive terms must leave the committee for at least one year before becoming eligible to serve again.

6. Revise § 923.25 to read as follows:

## § 923.25 Acceptance.

Any person prior to selection as a member or an alternate member of the committee shall qualify by filing with the Secretary a written acceptance of willingness to serve on the committee.

7. Amend § 923.41 by adding a new paragraph (c) to read as follows:

## § 923.41 Assessments.

\* \* \* \* \*

(c) If a handler does not pay any assessment within the time prescribed by the committee, the assessment may be subject to an interest or late payment charge, or both, as may be established by the Secretary as recommended by the committee.

## § 923.52 [Amended]

8. In § 923.52, paragraph (a)(3) is amended by adding the word "markings," after the word "dimensions,".

9. Amend § 923.54 as follows

a. Remove the words "(including shipments to facilitate the conduct of marketing research and development projects established pursuant to § 923.45)," in paragraph (b) and add a new sentence at the end of the section; and

b. Add a new sentence at the end of paragraph (c) to read as follows:

## § 923.54 Special purpose shipments.

\* \* \* \* \*

(b) \* \* \* Specified purposes under this section may include shipments of cherries for grading or packing to specified locations outside the production area and shipments to facilitate the conduct of marketing research and development projects established pursuant to § 923.45.

(c) \* \* \* The committee may rescind or deny to any packing facility the special purpose shipment certificate if proof satisfactory to the committee is obtained that cherries shipped for the purpose stated in this section were

handled contrary to the provisions of this section.

10. Amend § 923.64 by adding a new sentence at the beginning of paragraph (c) to read as follows:

**§ 923.64 Termination.**

\* \* \* \* \*

(c) The Secretary shall conduct a referendum six years after the effective date of this paragraph and every sixth year thereafter to ascertain whether continuance of this part is favored by growers. \* \* \*

\* \* \* \* \*

Dated: November 2, 2000.

**Kenneth C. Clayton,**

*Associate Administrator, Agricultural Marketing Service.*

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