

**Subpart A—Fresh Russet Potato Diversion Program****§ 80.1 Applicability and payments.**

Payment be received or retained with respect to diversions of 2001 Fresh Russet potatoes as allowed by the Administrator of the Agricultural Marketing Service (AMS), of the Department of Agriculture (USDA) using standards set out for consideration in the relevant **Federal Register** notice published on April 13, 2001 (66 FR 19099) except that total funding for the program may be an amount up to \$12 million. If a person has or will receive such a payment and there is a failure to comply with the conditions for payment or any condition for payment set out in the application, or that otherwise applies, all sums received by a person shall be returned with interest. No other claims for payment by producers or other persons under this part based upon their diversion of potatoes, shall be allowed except as approved by the Administrator of the Agricultural Marketing Service (AMS), of the Department of Agriculture (USDA). In all cases, the Administrator may set such other conditions for payment as may be allowable and serve the accomplishment of the goals of the program.

**§ 80.2 Administration and disputes.**

Administration of this part shall be under the supervision of the Deputy Administrator, Fruit and Vegetable Programs, AMS, and implemented for AMS through the Farm Service Agency (FSA) of USDA. Disputes shall be resolved by FSA by using regulations found in 7 CFR part 780.

**Subpart B—[Reserved]**

Dated: November 15, 2001.

**A. J. Yates,**

*Administrator, Agricultural Marketing Service.*

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**DEPARTMENT OF AGRICULTURE****Agricultural Marketing Service****7 CFR Part 923**

[Docket Nos. 99AMS–FV–923–A1; FV00–923–1]

**Sweet Cherries Grown in Designated Counties in Washington; Order Amending Marketing Agreement and Order No. 923**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the marketing agreement and order (order) for Washington sweet cherries. The amendments were submitted by the Washington Cherry Marketing Committee (Committee), the agency responsible for local administration of the order. The changes will: Increase the production area to cover the area in the State of Washington east of the Cascade Mountain Range 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 written acceptance of willingness to serve prior to selection. These changes were favored by sweet cherry growers in a mail referendum and will improve the operation and functioning of the Washington sweet cherry marketing order program. Proposed amendments to establish tenure requirements for Committee members and to require that continuance referenda be conducted every 6 years were not favored by sweet cherry growers in the mail referendum and are not being implemented.

**EFFECTIVE DATE:** December 21, 2001.

**FOR FURTHER INFORMATION CONTACT:** Teresa Hutchinson, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Northwest Marketing Field Office, 1220 S.W. Third Avenue, room 369, Portland, Oregon 97204; telephone (503) 326–2724 or Fax (503) 326–7440; or Kathleen M. Finn, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, room 2525–S, Washington, D.C. 20250–0200; telephone: (202) 720–2491, or Fax: (202) 720–8938.

Small businesses may request information on compliance with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 96456, Room 2525–S, Washington, DC 20090–6456; telephone (202) 720–2491; Fax (202) 720–8938.

**SUPPLEMENTARY INFORMATION:** Prior documents in this proceeding: Notice of Hearing issued on November 3, 1999, and published in the November 8, 1999, issue of the **Federal Register** (64 FR 60733). Recommended Decision and Opportunity to File Written Exceptions issued on November 2, 2000, and published in the **Federal Register** on November 9, 2000 (65 FR 67584). USDA's Decision and Referendum Order issued March 1, 2001, and published in the **Federal Register** on March 6, 2001 (66 FR 13447).

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

**Preliminary Statement**

This final rule was formulated on the record of a public hearing held in Yakima, Washington, on November 16, 1999, to consider the proposed amendment of Marketing Agreement and Order No. 923, regulating the handling of Washington sweet cherries, hereinafter referred to collectively as the "order." The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), hereinafter referred to as the "Act," and the applicable rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders (7 CFR part 900). The Notice of Hearing contained amendment proposals submitted by the Committee and the U.S. Department of Agriculture.

The Committee's proposals were to: (1) Increase the production area to cover the area in the State of Washington east of the Cascade Mountain Range; redefine the districts established under the order; and authorize special purpose shipments, with appropriate safeguards, to facilitate the movement of cherries to packing facilities outside the production area; (2) increase representation on the Committee by adding one additional handler member; (3) authorize the Committee, with USDA approval, to collect late payment and interest charges on delinquent assessments; (4) authorize the Committee, with USDA approval, to establish container marking requirements; and (5) authorize Committee nominees to qualify as a

member or alternate by filing a written acceptance of willingness to serve prior to the selection.

Also, the Fruit and Vegetable Programs of the Agricultural Marketing Service (AMS), U.S. Department of Agriculture (USDA), proposed three amendments: (1) Establish a limit on the number of consecutive terms a person may serve as a member of the Committee; (2) require that continuance referenda be conducted every 6 years to ascertain grower support for the order; and (3) adopt such changes as may be necessary to the order, if any of the above amendments are adopted, so that all of its provisions conform with those amendments. No conforming changes have been deemed necessary.

Upon the basis of evidence introduced at the hearing and the record thereof, the Administrator of the AMS on November 2, 2000, filed with the Hearing Clerk, U.S. Department of Agriculture, a Recommended Decision and Opportunity to File Written Exceptions thereto by December 11, 2000. None were filed.

A USDA's Decision and Referendum Order was issued on March 1, 2001, directing that a referendum be conducted during the period April 10 through April 27, 2001, among growers of sweet cherries to determine whether they favored the proposed amendments to the order. In the referendum, all of the amendments proposed by the Committee were favored by more than two-thirds of the growers voting in the referendum by number and volume. The proposals submitted by USDA regarding committee tenure requirements and periodic continuation referenda on the marketing order received majority support but failed to receive the required support for passage.

The amended marketing agreement was subsequently mailed to all sweet cherry handlers in the production area for their approval. The marketing agreement was approved by handlers representing more than 50 percent of the volume of sweet cherries handled by all handlers during the representative period of April 1, 2000, through March 31, 2001.

### 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, the AMS has prepared this final 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 \$750,000. 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 there are approximately 75 handlers currently regulated under Marketing Order No. 923. There are two additional packing houses in the expanded production area that will be considered handlers. There are four packing operations in Oregon that pack Washington cherries for grower/handlers. In addition, there are about 1,600 cherry growers in the production area. This amount includes about 200 additional growers from the expanded production area. 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.

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 amended 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.

The amendments to the Washington sweet cherry marketing order will be beneficial to business entities, both large and small.

### 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 export 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 being included with this action 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 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 will 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 helps to ensure that all major production will be covered under the marketing order in the future. The amendment also benefits 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 amendment 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 amended production area is the smallest regional area, which is practicable, while maintaining program effectiveness.

The record revealed that the cherry farm sizes in Washington range 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 amended production area that are larger than the average farm. Some farms in the amended 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 should 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 amendment will 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. The amendment allowing cherry shipments outside the production area for packing provides safeguards 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 cannot 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 amended production area will help 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 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 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 amendment to allow shipments of Washington cherries outside the production area for packing specifically addresses this issue. This amendment provides 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 amendment to ensure compliance with the amendment to authorize shipments outside the production area.

Because the production area is expanded, it is 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.

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

#### *Committee Representation*

The amendment to increase representation on the Committee by adding one additional handler member will 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 was not expanded.

Increasing representation on the Committee allows 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 are 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 amendment to authorize the Committee, with AMS approval, to collect late payment and interest charges on delinquent assessments will 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 are associated for handlers who pay timely assessments.

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

#### *Container Marking Requirements*

The amendment to authorize the Committee, with AMS approval, to establish container marking requirements further expands and enhances the current container and pack requirements already being used. Uniform marking requirements will 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 amendment are in the form of uniform marking requirements for Washington sweet cherries.

#### *Combining Forms Required by Committee Nominees*

The 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 allows the selection process to take place in a more timely fashion.

The amendment deletes the requirement that the selected member/alternate file a written acceptance after notification of selection and combines

the acceptance letter with the background statement submitted prior to selection. The nominee will, 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 amendment. 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.

#### **Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the reporting and recordkeeping provisions that will be generated by the amendments have been approved by the Office of Management and Budget (OMB) under OMB control number 0581-0189. 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. Previous total burden hours were approximately 69 hours and only related to referenda and nominations. Sixty eight of these hours related to producer referenda for order amendments and handlers signing of marketing agreements. The other hour covered time spent by Committee members and alternates completing membership forms. Adding the additional growers and handlers from the expanded production area increases the overall burden for referenda documentation by approximately 22 hours. Adding an additional handler member will 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 will be dramatically increased. It is anticipated an application form will be developed for these packing operations. These provisions and any additional provisions modifying reporting and recordkeeping burdens that generate from these amendments will not be effective until receiving OMB approval. Current information collection requirements for part 923 are approved by OMB under OMB number 0581-0189.

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 USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this final 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 are 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 were 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.

#### **Civil Justice Reform**

The amendments contained in this rule have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. The amendments will not preempt any State or local laws, regulations, or policies, unless they represent 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 USDA 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 USDA 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 USDA's ruling on the petition, provided an action is filed not later than 20 days after date of the entry of the ruling.

#### **Order Amending the Order Regulating the Handling of Sweet Cherries Grown in Designated Counties in Washington**

##### *Findings and Determinations*

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

##### *(a) Findings and Determinations Upon the Basis of the Hearing Record.*

Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), and the applicable rules of practice and procedure effective thereunder (7 CFR part 900), a public hearing was held upon the proposed amendments to the Marketing Agreement and Order No. 923 (7 CFR part 923), regulating the handling of sweet cherries grown in designated counties in Washington.

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

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

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

(3) The marketing agreement and order, as hereby amended, are limited in application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area

would not effectively carry out the declared policy of the Act;

(4) The marketing agreement and order, as hereby amended, prescribe, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of sweet cherries grown in the production area; and

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

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

(1) Handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping sweet cherries covered by the order as hereby amended) who, during the period April 1, 2000, through March 31, 2001, handled 50 percent or more of the volume of such cherries covered by said order, as hereby amended, have signed an amended marketing agreement; and

(2) The issuance of this amendatory order is favored or approved by at least two-thirds of the producers who participated in a referendum on the question of approval and who, during the period April 1, 2000, through March 31, 2001 (which has been deemed to be a representative period), have been engaged within the production area in the production of such cherries, such producers having also produced for market at least two-thirds of the volume of such commodity represented in the referendum.

**Order Relative to Handling of Sweet Cherries Grown in Designated Counties in Washington**

*It is therefore ordered,* That on and after the effective date hereof, all handling of sweet cherries grown in designated counties in Washington shall be in conformity to, and in compliance with, the terms and conditions of the said order as hereby amended as follows:

The provisions of the proposed marketing agreement and order amendments contained in USDA's Decision issued by the Administrator on March 1, 2001, and published in the **Federal Register** on March 6, 2001, shall be and are the terms and provisions of this order amending the order and are set forth in full herein.

**List of Subjects in 7 CFR Part 923**

Marketing agreements, Cherries, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, 7 CFR part 923 is 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.

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 § 923.25 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 USDA a written acceptance of willingness to serve on the committee.

6. Revise § 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 USDA as recommended by the committee.

**§ 923.52 [Amended]**

7. In § 923.52, paragraph (a)(3) is amended by adding the word “markings,” after the word “dimensions,”.

8. 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 paragraph; 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.

Dated: November 15, 2001.

**A. J. Yates,**

*Administrator, Agricultural Marketing Service.*

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**BILLING CODE 3410–02–P**

**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 930**

**[Docket No. FV01–930–4 FR]**

**Tart Cherries Grown in the States of Michigan, et al.; Temporary Suspension of a Provision Regarding a Continuance Referendum Under the Tart Cherry Marketing Order**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This rule temporarily suspends an order provision which requires a continuance referendum to be conducted on the marketing order for tart cherries during March 2002. The suspension will enable the U.S. Department of Agriculture (USDA) to postpone conducting the continuance referendum until the completion of